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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 134

DAVID NAMET, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MAY 21, 1962
CERTIORARI GRANTED OCTOBER 15, 1962

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 60-303-S.

THE UNITED STATES

vs.

DAVID NAMET

DOCKET ENTRIES

1960		
Dec.	27	Information filed
1961		
Jan.	9	Sweeney, Ch. J. Deft. arraigned and pleaded not guilty; bail cont'd.
	9	Appearance of John H. FitzGerald for deft. filed
Feb.	27	Court reporter's transcript of proceedings on Jan. 9, 1961, filed
Sep.	26	Appearance of Paul J. Redmond, Asst. U S Atty.
Oct.	3	Sweeney, Ch. J. Deft. set to the bar to be tried; jury trial begins, jury sworn and empanelled; evidence; adjourned to Oct. 4.
	4	Sweeney, Ch. J. Jury trial continues; evidence; conclusion of Gov't evidence; conclusion of deft's evidence; deft's oral motion for judgment of acquittal, motion denied; Gov't Memo. filed; arguments; committed to jury; deliberation; verdict —guilty on both counts; disposition in two weeks.
Oct.	23	Sweeney, Ch. J. Deft. sentenced to be imprisoned for a period of four (4) months and to pay a fine of $1000.00; execution of sentence stayed for two (2) weeks for appeal.
	31	Judgment and commitment entered. Attested copy to Hon. W. Arthur Garrity, Jr., Paul J.

[fol. 2]

Redmond, Esq., Asst., to John H. Fitzgerald, Esq. One State St., Boston and to Daniel F. Griffin, Esq., Chief Probation Officer Oct. 31, 1961.

31 Notice of Appeal from jdgmt entered Oct 31, 1961 filed by deft.

Nov. 1 Stmt of docket entries w/cy N/A delivered to Court of Appeals. Cy N/A to Paul Redmond, Asst. U.S. Atty.

15 Original pleadings delivered to Court of Appeals.

15 Stenographic Record of trial Oct 3, 1961, filed.

22 Stenographic record filed Nov 15, 1961 delivered to Ct. of Appeals.

No. 60-304-S.

THE UNITED STATES

vs.

IRVING KAHN AND ANNETTE KAHN

DOCKET ENTRIES

1960

Dec. 27 Information filed

1961

Jan. 9 Sweeney, Ch. J. Deft. Irving Kahn arraigned and pleaded not guilty; Ordered to recognize in the sum of $1000. personal; forty eight hours for motions; Recog on file

9 Appearance of John H. FitzGerald for both defendants filed

9 Sweeney, Ch. J. Deft. Annette Kahn arraigned and pleaded not guilty; Ordered to recognize in the sum of $1000. personal; forty eight hours for motions; recog. on file.

[fol. 3]

Feb. 27 Court Reporter's transcript of proceedings on Jan. 9, 1961, filed

Sep. 26 Appearance of Paul J. Redmond, Asst. U.S. Atty.

Oct. 3 Sweeney, Ch. J. Deft. Irving Kahn retracted plea of not guilty and pleaded guilty; bail cont'd. Disposition in two weeks.

3 Sweeney, Ch. J. Deft. Annette Kahn retracted plea of not guilty and pleaded guilty; bail cont'd. Disposition in two weeks.

Oct. 5 Court Reporter's transcript of proceedings on Oct. 3, 1961, filed

23 Sweeney, Ch. J. Deft. Irving Kahn sentenced to be imprisoned for a period of one year, execution of sentence suspended and defendant placed on probation for a period of two (2) years, to pay a fine of $1500. by October 24, 1961 at 11 A.M. or stand committed.

23 Sweeney, Ch. J. Deft. Annette Kahn—imposition of sentence suspended and deft. placed on probation for a period of two years.

31 Judgment and order of probation Irving Kahn entered Copy to Hon. W. Arthur Garrity, Jr., U S Atty., Paul J. Redmond, Esq., Asst., John H. Fitzgerald, Esq., One State St., Boston, and to Daniel F. Griffin, Esq., Ch. Probation Officer, Federal Bldg., Boston, Oct. 31, 1961.

31 Judgment and order of probation Annette Kahn entered. Copy to Hon. W. Arthur Garrity, Jr., U S Atty., Paul J. Redmond, Esq., Asst., Federal Bldg., Boston, John H. Fitzgerald, Esq., One State St., Boston Oct. 31, 1961, and to Daniel F. Griffin, Esq., Chief Probation Officer, Federal Bldg., Boston.

[fol. 4]

IN THE UNITED STATES DISTRICT COURT

Excerpts from Stenographic Record of Trial before Sweeney, Ch. J.

OPENING STATEMENT BY MR. REDMOND

Good morning, ladies and gentlemen. My name is Paul Redmond. I am an assistant United States Attorney and I represent the Government here today. Mr. John Fitzgerald represents the defendant David Namet. And the Honorable Justice Sweeney will preside over the case.

I would like to read you the information in this case, the formal charge against David Namet (reading).

> "The United States Attorney charges David Namet —Count 1—of Chelsea in the District of Massachusetts, from on or about February 16, 1960 through on or about March 19, 1960 at Chelsea in said district did engage in the business of accepting wagers, as defined in 26 U.S.C. 4421 and did engage in receiving wagers for on behalf of a person liable for the tax on wagers imposed by 26 U.S.C. 4401, having willfully failed, prior to engaging in said business and receiving said wagers, to pay the special occupational tax as required by 26 U.S.C. 4411, due and owing to the United States for the year ending June 30, 1960, in violation of 26 U.S.C. 7203.
>
> "The United States Attorney further charges—Count 2—David Namet of Chelsea in the district of Massachusetts, from on or about February 16, 1960 through on or about March 19, 1960 at Chelsea, in said district, did engage in the business of accepting wagers as defined in 26 U. S. Code 4421, and did engage in receiving wagers for on behalf of a person liable for the tax on wagers imposed by 26 U.S. Code 4401, having willfully failed, prior to engaging in said business and receiving said wagers, to register as required by 26 U. S. Code [fol. 5] 4412, in violation of 26 U. S. Code 7203".

Ladies and gentlemen, his Honor will apprise you of the law, but I would like to say two or three things about it in my opening remarks to you.

There are two counts to the information I have just read to you. One is that the defendant willfully failed to pay an occupational tax. Now, this is the special occupational tax of $50.

The second count is that he willfully failed to register with the District Director of Internal Revenue.

Now, what happens here is that he must register with him if he is going to be in the business of accepting wagers, and he must pay a special occupational tax.

I just want you to keep those two things in mind, that there are two separate charges here. And at the end of the case his Honor will give you the law on it.

Now, as to the evidence the Government will produce, the Government will tend to show you, number one, that the defendant David Namet willfully failed to register, and that he willfully failed to pay the special occupational tax, full well knowing that he should have done both of these things.

You will hear testimony by a representative of the District Director's office of the Internal Revenue for this district, that the defendant David Namet did not register and did not pay a tax.

Also, I have reason to believe that there will be testimony by a husband and wife that they did accept wagers as agents for the defendant David Namet, that he was in fact their principal, and that he did not merely pick up slips from them on which they had accepted wagers, but I have reason to believe they will testify that he would settle with them each day on the accounts, on the bets, that they had taken the previous day.

[fol. 6] Further, there will be testimony by Special Agents of the Intelligence Division of the Internal Revenue system —these gentlemen are commonly known as the Racket Squad —that they kept the defendant David Namet under surveillance for a period of almost two months, and they will testify as to the defendant's regular movements in an area in Chelsea; they will testify they could almost set their watch by the defendant's movements from one store, to another store, to another store.

You will also hear testimony by some of these agents that these stores—that they observed in these stores wagers being placed, and that these stores were bookie parlors.

These agents will further testify that they accompanied James E. Mahoney, Deputy United States Marshal, to the defendant Namet's home on March 19, 1960, and there seized materials of wagering.

These materials will be presented to you through the Deputy Marshal, and a valuation of them will be made for you by one of the Intelligence Agents who will qualify as an expert in this field.

Thank you.

COLLOQUY BETWEEN COURT AND COUNSEL

(Conference at the bench as which the following was recorded:

Mr. Fitzgerald: Your Honor, it is my understanding that the United States Attorney is going to attempt to use the Kahns as witnesses.

Now, keeping in mind that they are defendants, that they are entitled not to testify in their own case—

The Court: They have pleaded guilty.

Mr. Fitzgerald: I know that, your Honor, but still I didn't waive any Constitutional privileges in their behalf.

The Court: I think the law is that they have no Constitutional privileges after they have pleaded.

[fol. 7] Mr. Fitzgerald: Your Honor, further that they are under investigation by the Internal Revenue Department as far as their income taxes are concerned, and everything else.

The Court: Well, I haven't seen them take the stand yet, and if they claim the Fifth, I will rule on it then.)

• • • • • • •

ANNETTE KAHN, Sworn

Direct examination.

By Mr. Redmond:

Q. Will you state your name, please?
A. Annette Kahn.
Q. Will you speak up just a little bit?
A. Annette Kahn.
Q. And would you give us your address, Mrs. Kahn?
A. 102 Essex Street—well, do you want the business address?
Q. No, your residential address.
A. 102 Essex Street, Chelsea, Mass.
Q. And are you and your husband proprietors of Harvey's Variety Store in Chelsea?
A. Yes, we are.
Q. Do you know the defendant David Namet, Sr.?
A. I have known him for about two years; we know him by sight.
Q. You do know him?
A. Yes, we know him by sight.
Q. During 1960, Mrs. Kahn, did you and your husband have some type of business relationship with the defendant David Namet?
A. Our attorney advised us not to answer on the plea of the Fifth Amendment.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Fitzgerald: The defendant refuses to answer on my advice.
[fol. 8] The Court: Step up here, please.

(Conference at the bench at which the following was recorded:

The Court: So far as the Namet case is concerned, because of the plea of guilty she can be compelled to testify against him.

As to the commission of any other crimes no, she cannot be; she has a right to claim the Fifth. But you have got to proceed on it slowly because—

Mr. Fitzgerald: Your Honor, may I stand beside her while she testifies, being her counsel?

The Court: Well, I would rather have you not stand beside her, because that could impress the jury.

But ask the questions slowly, and you can take your objection each time.

Now, I want you to be very careful not to bring in the commission of any other crimes, or ask her any questions which would relate other than to her—.

Mr. Redmond: Or her husband as a co-defendant? I don't believe she can be compelled to testify—

The Court: Co-defendant?

Mr. Redmond: With her. It is a husband and wife situation, too.

The Court: She can't testify to conversations, of course, but she can testify as to what she did and what she saw with relation to Namet.

Mr. Fitzgerald: Your Honor, if I should rise in my chair, may that be taken that she pleads the Fifth Amendment?

The Court: Yes. Now, the question pending is what?

Mr. Redmond: Did she have business relationships.

The Court: That is a legal conclusion, a business relationship.

[fol. 9] She says she knew him, I think, and you can ask her what her relationship was, not business relationship. And anything he said or did, she can testify to.

Mr. Fitzgerald: Your Honor, may I speak to the witness?

The Court: Yes.

(Mr. Fitzgerald confers with the witness.)

(The conference at the bench continues:

The Court: I want you to consider another practical aspect of this. I know you are in a spot with separate defendants, but if she is going to claim the Fifth Amendment and the Court sustains her, when it comes to the disposition of her case she can't claim that she cooperated with the Government.

Mr. Fitzgerald: That is true, your Honor.

The Court: You may be heading into a bad spot.

Mr. Fitzgerald: I didn't have that in mind when I pleaded her, your Honor, that she would cooperate with the Government.

The Court: But when it comes to the disposition, many times defendants' counsel seek leniency on the ground that the defendant did cooperate.

Mr. Fitzgerald: I don't see how I can, your Honor; I don't see actually how I can make that claim. If I am wrong, it is me that is wrong, not her. They are listening to me only, and I am doing the best I know how.

The Court: I want you to do that. Has Nanet got a defense here?

Mr. Fitzgerald: He has, yes, sir. In other words, your Honor, I don't believe that they can show he received one wager, accepted one wager, within the interpretation by the Court of the statute.

The Court: Isn't one enough?

[fol. 10] Mr. Fitzgerald: One is not enough, no. They can't show one.

Mr. Redmond: Might I say this, your Honor? The problem I have here, your Honor, is that what Mr. Fitzgerald says is true, but with these two witnesses I can show that he was a principal. This is the reason they are essential to my case.

The Court: Well, you have got a question—I am going to be very careful that she doesn't lend herself to a charge of conspiracy.

Now, conspiracy is a separate crime. You haven't charged it against either one of them here, and I can't let her testify to anything that will convict her of conspiracy, or lay her open to it.

She has a right to claim the Fifth Amendment on that.

Mr. Fitzgerald: Well, your Honor, of course you won't sit in judgment on the facts, but may I say this, that I don't believe the Government can prove he is a principal. They have a lot of circumstantial evidence, but that circumstantial evidence can be interpreted two ways.

The Court: Well, circumstantial evidence is just as good as direct evidence.

Mr. Fitzgerald: I agree, your Honor.

The Court: Can't you arrange a disposition of this case?

Mr. Fitzgerald: Well, your Honor, the man's car has been taken on top of this. Actually, it is his son's car.

I am in this position. I am going to produce one witness, it is the man's son, a member of the bar, Boston College, and Boston College Law School graduate, and he is a practicing attorney, a young fellow.

His mother had just died, and he can tell you this, what [fol. 11] money they found was the proceeds of insurance policies.

The Court: What has that got to do with this case?

Mr. Fitzgerald: I am just saying, this boy lives in this house with his father. He knows what his father is, a retired man, he is the type of man, just to tell you, if I wanted a writ filed, or a paper in Boston—

The Court: I know, but—

Mr. Fitzgerald: I am just saying that this is the way of the case that I will present. I mean, you take a look at this man, and if you can conclude he is a principal—I am just saying, resting upon your Honor's own experience in the past with principals in these courts.

Mr. Redmond: This woman made admissions, too.)

The Court: I think I will let the jury have a recess now, while I discuss some points with counsel. You may retire. Have the witness leave the stand.

(The conference at the bench continues

Mr. Redmond: Here is what my problem is. This woman and her husband made statements to two Special Agents of the Intelligence Division, that they accepted wagers, and that when Namet came around he picked up the wagers, but that if the hits—and they would deduct 25 per cent off the top, that was their take, and we found slips in a raid on Harvey's Variety Store, with 25 taken off the gross amount.

They further told the agents that if the hits from the day before were more than the 75 per cent that was left, the gross that was left, that Namet would give them cash.

Now, your Honor, if that doesn't make him a principal, I don't know what does.

[fol. 12] Mr. Fitzgerald: That is consistent with the doings of a pickup man.

Mr. Redmond: It is not. The Calamaro case says merely he is picking up papers. I can bring experts in to testify

that a pickup man never handles cash and never pays off. All he does is pick up envelopes.

Mr. Fitzgerald: I dispute that myself. I am as familiar with what happens in those operations as I think anybody is, and every post office employee is that works on the street. It is consistent with the doings of a pickup man.

Mr. Redmond: To settle up with people?

Mr. Fitzgerald: He delivered whatever was settled.

The Court: But if he turns money over to pay short bets, he is not a pickup man.

Mr. Redmond: These statements were made not in the presence of the defendant, so that I have to convict Namet out of the Kahns' mouth.

Mr. Fitzgerald: But you can't make them say any statements against him that were not said in his presence.

Mr. Redmond: I am not going to go through the conversation.

The Court: I don't see how you can bring that evidence in without laying her open to a charge of conspiracy. She has a right to claim the Fifth against that.

Mr. Redmond: You mean conspiracy with Namet?

The Court: Any conspiracy, particularly a conspiracy with Namet. In other words, if they testified to these things, it would be perfectly easy for you to go to a grand jury and get an indictment on a charge of conspiracy and [fol. 13] they would have no—have you talked this over with Mr. Garrity?

Mr. Redmond: Well, I haven't talked it over with Mr. Garrity. I talked with Mr. Weyman Lundquist who was handling the case before I was.

The Court: I don't see how you can get that evidence in. If you had a charge of conspiracy against them and they pleaded guilty, that would be a different proposition. Have you got any chief of your criminal division down there now besid Mr. Garrity?

Mr. Redmon o, we haven't.

The Court: It would be impossible for you to go down and talk to him?

Mr. Redmond: With Mr. Garrity?

The Court: Yes.

Mr. Redmond: I don't know. I could see if I could.

The Court: Suppose the Kahns did not plead. What could you have done?

Mr. Redmond: I can then show that they—the places he regularly visited were bookie operations.

The Court: Why don't you take the Kahns off the stand and use your other testimony? Well, consider that for a few minutes, while we take a short recess.)

(Short recess.)

Mr. Redmond: May I proceed, your Honor?

The Court: Yes.

Mr. Redmond: Mrs. Kahn, please.

ANNETTE KAHN, Resumed

Direct examination.

By Mr. Redmond:

Q. Mrs. Kahn, I just want to ask you a few questions. You and your husband ran Harvey's Variety Store, did you?

A. Yes.

[fol. 14] Q. You were proprietors there?

A. Yes.

Q. Do you own the property?

A. We own it, yes.

Q. How long have you owned the property?

A. Well, we bought the property 13 years ago when we went—when we got this place, see, we have another place and cleared out, and we have been at this place about 13 years in August.

Q. Do you, Mrs. Kahn, know what a wagering tax stamp is?

A. I do know now, yes.

Q. When did you find out what it was?

Mr. Fitzgerald: I pray your Honor's judgment.

The Court: I will allow that.

Mr. Fitzgerald: I can't see what materiality it has.

The Court: Well, I can't pass on that at this moment, but I see no objection to it at the moment.

Q. You said "I do now"; is that the answer to the last question?

A. Yes.

Q. When did you find out what it was?

A. Well, when all this confusion came about.

Q. After March 19, 1960. You didn't know prior to that what it was, and you didn't know that a person who was engaged in accepting wagers had to register, and you didn't know that a person—

Mr. Fitzgerald: I pray your Honor's judgment. I can't see the materiality.

The Court: Step up here, please, and make an offer of proof.

COLLOQUY BETWEEN COURT AND COUNSEL

(Conference at the bench at which the following was recorded:

The Court: What is it?

Mr. Redmond: These are the questions I wanted to ask her.

The Court: But they have got to be material.

Mr. Redmond: Because it will show that she cannot then be tried for conspiracy.

[fol. 15] Mr. Fitzgerald: I pray your Honor's judgment.

The Court: No, she is open to a charge of conspiracy.

Mr. Fitzgerald: I shall object to any further questions along this line, your Honor.

Mr Redmond: In the Ingram case, it says the person must have knowledge of this.

Mr. Fitzgerald: She is not on trial here.

The Court: That is right. I will sustain the objection to that. You had better proceed with your other witnesses.

Mr. Redmond: Well, can I have a 15-minute recess? I talked to some of the agents, and I would like to talk to Mr. Garrity.

Mr. Fitzgerald: Well, your Honor—(a pause).

Mr. Redmond: It is obvious I am not going to be able to proceed with these two witnesses.

The Court: That is the way you came in to court, until they decided to plead, so why don't you try the case that you had without them.

Mr. Redmond: There is some question as to how strong our case is without them.

The Court: Well, if you haven't got a case, drop it.

Mr. Redmond: That is why I would like to talk to Mr. Garrity.

The Court: All right.)

The Court: The Government would like another 15-minute recess. I was going to recess about 20 minutes past 12.00, anyway, so I think I will let you go to lunch now, and come back at 2.00 o'clock.

(Jury excused.)

Mr. Fitzgerald: Could the Kahns be allowed to go? They run a little store, and it is their living now.

[fol. 16] The Court: If they are under summons, they can't.

Mr. Fitzgerald: Mr. Redmond, can I allow the Kahns to go?

Mr. Redmond: I think I am through with them, your Honor, yes.

Mr. Fitzgerald: All right.

The Court: We have a case here that sustains your position, except that this fellow who was a witness had pleaded guilty to both conspiracy and the substantive offense, then he took the stand and the lower court sustained him in his right not to testify. But the Circuit Court, the Second Circuit, Judge Hand, they reversed it.

Mr. Redmond: Well, your Honor, my position was this, that I only wanted to confine my questioning to the thing —No. 1, to the point that she had already pleaded guilty; she pleaded guilty and she no longer was in jeopardy.

And these preliminary questions I asked her show that, No. 2, she cannot be convicted of a conspiracy charge.

The Court: No, it doesn't say she can't be convicted. She might be put in jeopardy of it.

For instance, although she said she didn't know it until March 19th, you might dig up evidence to show that she did know it before March 19th. She would be open to a charge of conspiracy.

You talk it over with whoever you want to talk it over with, and if you have a case let's proceed with it.

I think you may have made a mistake letting the Kahns go. I think you had better keep them until 2.00 o'clock. They are still here?

Mr. Redmond: Yes, sir.

The Court: Or can you let one of them go home?

Mr. Fitzgerald: One of them I would like to have go home, preferably the husband; he has a bad heart, I know that, and he is under the doctor's care. Could you let one of them go?

[fol. 17] Mr. Redmond: I don't like to be harsh. I would just as soon proceed with both of them, and see what I could do.

Mr. Fitzgerald: Well, I would object.

The Court: You may be criticized downstairs if you let them go.

Mr. Redmond: This is the thought that occurred to me after I said "Yes, I can"; I want to talk to them first—

Mr. Fitzgerald: Talk to whom?

Mr. Redmond: Mr. Garrity.

Mr. Fitzgerald: Oh, I thought you meant the Kahns.

Mr. Redmond: Oh, no.

The Court: Why don't you do this? Keep the Kahns here, but go right down and talk to him now, so you can tell Fitzgerald whether you want them or not. And I will be back here at quarter of 2.00, and meet you gentlemen in chambers at quarter of 2.00, and start the trial at 2.00 o'clock.

Mr. Fitzgerald: Thank you.

Mr. Redmond: Thank you, your Honor.

* * * * * * *

CHARLES F. BURLEY, Sworn

Direct examination.

By Mr. Redmond:

* * * * * * *

Q. Would you tell us what you were doing there that day, when you observed—

A. I went to observe the Hawthorne Variety Store at 104 Hawthorne Street.

Mr. Fitzgerald: I pray your Honor's judgment. Does this have a bearing on the defendant?

The Court: How can I tell until I hear what he says?

Q. What time did you enter the premises?

A. I entered the premises at approximately 8.30 a.m.

[fol. 18] Q. Would you tell us what you observed?

A. Well, I observed in a period of an hour and 40 minutes the clerk, John, inside the store, accept number pools from six patrons of the store, that he wrote slips and accepted the money.

The Court: Now, was the defendant there?

Mr. Redmond: The defendant was not there, your Honor.

The Court: Then I cannot receive this testimony. The jury will disregard that testimony.

Mr. Redmond: Then could I withdraw this witness and put on another one, your Honor, and have the right to recall him?

The Court: I want this case speeded up. We started several hours ago and we have gotten nowhere yet. Yes, go ahead and call someone.

Mr. Redmond: All right, fine. You may step down. Special Agent Robert Sawtelle.

ROBERT A. SAWTELLE, Sworn

Direct examination.

By Mr. Redmond:

* * * * * * *

There were instances when I followed him on foot. He wore the same attire each day, he had a gray over-jacket, almost knee-length, he had patch pockets on either side of that over-jacket that fitted smoothly to his person.

As he made his afternoon visits, those pockets were more obviously filled with a material; as he made visit after visit, the pockets progressively filled with whatever he had taken from those premises.

The fact that after circulating in the afternoon the route and returning directly to his home carrying this material in these pockets, and once reaching his home didn't [fol. 19] leave the premises, nor did anybody else come to the premises and collect from him, indicated to me that—

Mr. Fitzgerald: I pray your Honor's judgment again, the use of the words of the witness.

The Court: Well, the words "and collected from him" may be stricken. The fact that no one appeared may stand.

The Witness: Well, the fact that nobody appeared at the premises indicated to me that that which he had brought on to the premises remained there with him.

The Court: Now, in your official capacity, were any of these places that he visited—did they have a reputation, a general reputation of any type?

The Witness: Yes, your Honor. Each of the places named by me had a general reputation as a bookmaking operation.

The proprietors of these locations and the persons on the premises being one and the same in many instances, had reputations—

Mr. Fitzgerald: Your Honor, I don't want to keep objecting, but I find that I must. These places have a reputation—they are all variety stores, and I believe he testified other people were going in and out of these stores.

The Court: Well, that is more or less a question of argument. Here is a man you admit is an expert who says they did have a reputation. Go ahead.

The Witness: And furthermore, the persons operating these stores for the most part had previous records of convictions for bookmaking violations.

Mr. Fitzgerald: I pray your Honor's judgment.

The Court: I will allow it.

The Witness: The observations I made of the respective locations I have named during the time when I did not have Mr. Namet under surveillance showed a consistent stream of pedestrians and vehicular traffic to the door, and in and out of the door of these respective places, that was [fol. 20] not conducive of the ordinary variety store or smoke shop customer trade.

Nor did the majority of these people come from those premises with any noticeable purchases in their hands.

And the morning visits made by Mr. Namet to these respective places differed from the afternoon visits in that the morning visits were of a duration of three to five minutes inside of each place, and the afternoon visits were of a duration, as I say, of 15 seconds, 30 seconds, 45 seconds, in and out, indicating to me a lengthier conversation between him and the persons in these premises in the morning, which was conducive in an operation of the type I have described with settling up in the morning, and merely collecting the material in the afternoon.

Mr. Fitzgerald: I pray your Honor's judgment. There is no evidence of what Mr. Namet did in these places. I think it is an unfair statement on the part of the witness.

The Court: What was the statement?

(The answer was read.)

The Court: Well, change the term "conducive" to "might be", and I will let it stand.

Q. Were you ever on any of these premises when David Namet, the defendant, entered them?

A. Yes, I was.

Q. What did you observe at that time?

A. On one morning I preceded Mr. Namet when he left the Hawthorne Variety and went down Third Street to the Third Street Smoke Shop.

I cut across directly at Chelsea Square, in order to be inside the Chelsea Square Smoke Shop at the time he would come in after finishing with the Third Street Smoke Shop.

So I went in and bought some cigarettes and a newspaper, and I was standing there having a conversation with the counterman when Namet did come in.

[fol. 21] Namet came in and stood inside the door and spoke to the counterman. I was standing between the two of them. And he asked the counterman who I was, and the counterman shook his head, he didn't know.

And Namet said, "I will wait until he leaves".

So I walked out, and Namet came out a few minutes later and continued on up the street to Dalis and Sullivan

Brothers and a couple of other stops he had in the Chelsea Square area.

But what he was doing there, he would not do in front of me.

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JAMES E. GREEN, Sworn

Direct examination.

By Mr. Redmond:

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Q. I would like to turn your attention now to March 8, 1960. Were you in the Old Timers Cafe in Chelsea on that day?

A. Yes.

[fol. 22] Q. Was the Old Timers Cafe in Chelsea one of the stops the defendant Namet used to make in his daily route?

A. It was.

Q. Would you tell us as to your observations in the Old Timers Cafe that day?

Mr. Fitzgerald: I pray your Honor's judgment.

The Court: Was the defendant Namet there?

Mr. Redmond: The defendant was not there, your Honor. Could we approach the bench?

The Court: Yes.

(Conference at the bench at which the following was recorded:

Mr. Redmond: Aren't we entitled to show that at these places he was visiting there was wagering going on?

The Court: No, not unless he saw the defendant there while the wagering was going on.

Mr. Redmond: Well, could I have a five minute recess?

The Court: What for?

Mr. Redmond: Because a lot of the witnesses I was going to put on, your Honor, I am not going to put on now. It will be much shorter this way, actually.

The Court: All right, the Court will recess.)

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Mr. Redmond: Mr. Fitzgerald says we can agree that this witness would qualify as an expert, in order to expedite matters. May the record show that?

The Court: All right, it is agreed.

Q. I show you now these two slips, Mr. Moulaison. Could you tell us what they are?

A. These are half price number slips which Agent Sawtelle described in his testimony.

[fol. 23] Basically, if the number is played too heavily, they periodically, or every six months, they will take these particular numbers and make them half price numbers, which in effect means that if they hit, that the return is cut in half.

Q. Would a bookie ordinarily have these in his possession?

A. Normally he would have, for the benefit of his customers.

Q. I show you now these various slips. Do you recognize these as part of the evidence taken at 110 Bloomingdale Street?

A. I do.

Q. Could you tell us what these are, Mr. Moulaison?

A. These are three by five pads or bookie slips, and reflect daily double bets almost exclusively.

The Court: Those slips, as written now, were found in the defendant's own home?

The Witness: That is my understanding, yes.

The Court: You didn't write these?

The Witness: No, sir.

Q. These are daily double. Are there any number plays in any of the envelopes, or cards, or on any of the other slips?

(A pause.)

Q. Let me ask you this. I now show you this card, Mr. Moulaison. Are there numbers upon that card?

A. There are.

Q. What do they reflect, in your opinion?

A. These are number plays, 4-number and 3-number plays.

Q. If a man played numbers with a bookie, is this the type of receipt he would get for it, any of these slips before you?

A. If a man played—?

Q. Played with numbers or horse bets.

A. None of these slips would be normally in the possession of a player. The player would end up with a carbon copy.

[fol. 24] Q. Would these be in the possession of the bookie normally?

A. Under normal circumstances the original slip would end up in the bookie's possession, yes.

Mr. Redmon: I have no further questions.

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[fol. 28]

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: All right, step down. Next witness.

Mr. Redmond: We have no further witnesses, your Honor.

The Court: All right, I will hear the defense.

Mr. Fitzgerald: Your Honor, does the Government rest?

Mr. Redmond: No, I presume we are going—that the memorandum can still be filed and we may still call—

The Court: Not if you are resting. I can't allow this court to be interrupted for another hour just to take on a memorandum. You are supposed to be prepared to try the case when you come in here. Is the defense ready to go ahead?

Mr. Fitzgerald: Yes, your Honor.

The Court: I will have to hear from the defense. I had assumed that when I said I would receive the memorandum in the morning, I had assumed that you would be going all afternoon.

Mr. Redmond: I had assumed we would, too, but four of our witnesses were not put on.

The Court: Let me see counsel up here.

(Conference at the bench at which the following was recorded:

The Court: I don't think you are going to be able to convince me about the Kahns, but I don't want to shut you off. But hereafter I want you to be ready on these things. Don't calculate too much on what is going to happen. How long will the defense take?

Mr. Fitzgerald: I have one witness, your Honor.

The Court: I think I can safely adjourn until 10:00 o'clock tomorrow. And I have got to have this case ended before 3:00 o'clock.

Mr. Fitzgerald: I might say that my witness—I will tell you who he is—he shouldn't take more than 20 minutes. [fol. 29] The Court: The defendant?

Mr. Fitzgerald: The defendant will not take the stand. His son will. I was also prepared, if the Government rested, to offer a motion for judgment of acquittal.

The Court: They do that in every case. I always expect that.

Mr. Fitzgerald: Sometimes they are allowed, too.

The Court: Sometimes.

Mr. Fitzgerald: I know I had a similar case with Judge Ford in United States vs. Amoroso, and we got that.

The Court: Well, I will hear you at 10:00 o'clock tomorrow morning. You give my secretary all the authorities you have tonight, right now, and give us anything in addition in the morning by 9:30. And I will meet you at quarter of 10:00 in the morning, and we will start the trial at 10:00 o'clock.

Mr. Redmond: Do I understand that on my memorandum, that this evidence will be excluded on the grounds that it would put her in jeopardy of having another charge against her?

The Court: No, I assume what she means to say is she doesn't want to testify because that may incriminate her.

Mr. Redmond: All right, fine.

The Court: She doesn't have to specify why. All she has to say is that. At this moment I don't see how you can avoid a charge that anything she says might incriminate her if a charge of conspiracy was brought against her. Amongst other things; I just mentioned conspiracy.

She may refuse to testify on the ground that it might show there was some bribery present, that she was oper-

ating a mission for some people. I don't know what the [fol. 30] crime might be. If she says the evidence might incriminate her, I have got to go along with her.

Probably, if I doubted her, I could examine her in private.

Well, that is about it.

Mr. Redmond: I talked to Mr. Garrity, and he was—well, this is something I will mention in my memorandum.)

* * * * * * *

IRVING KAHN, Sworn

Direct examination.

By Mr. Redmond:

Q. Will you state your name, please, sir?
A. Irving Kahn.
Q. And your address, Mr. Kahn?
A. 102 Essex Street, Chelsea.
Q. You run a variety store in Chelsea, Mr. Kahn?
A. Yes.
Q. Do you know the defendant David Namet?
A. Yes, sir.
Q. Did you have some dealings with the defendant David Namet in February and March of 1960?
A. I refuse to answer by advice of counsel.

The Court: All right, I will order you to answer that question. The question is yes or no, did you have some dealings with him?

The Witness: Yes.

Q. Can you tell us what those dealings were?
A. I refuse to answer on advice of counsel.

The Court: Go ahead. Next question.

Q. Did you accept wagers at your variety store in Chelsea in February and March of 1960?
A. I refuse to answer on the advice of counsel.

[fol. 31] The Court: I will allow that question.

The Witness: Did I accept wagers?

Q. Yes.
A. No.
Q. You did not accept wagers?
A. No, sir.
Q. You never took a bet in your variety store?
A. I refuse to answer that question.

The Court: I will allow that question.
Mr. Fitzgerald: I believe, your Honor, he has already pleaded guilty to that.
The Court: That is all right, let's see how consistent he is going to be.
Mr. Fitzgerald: I guess he is misinterpreting my standing up, your Honor.
The Court: What is that?

(Conference at the bench at which the following was recorded:

Mr. Fitzgerald: Yesterday when I was up here, I explained to the Court that rather than my objecting all the time, if I stood up it would be a signal for the witness to say that, and we agreed. I think when I am standing up now he is confused.
The Court: Then sit down.
Mr. Fitzgerald: Could I just speak to him for a minute?
The Court: No, I have spoken to him.
Mr. Redmond: Can I proceed, your Honor?
The Court: Yes.
Mr. Fitzgerald: Now I won't know whether to stand up or not.
The Court: Well, don't give him any signals. I will take care of it.)

The Court: Now, Mr. Witness, you look at me each time a question is put to you, and I will tell you whether to answer it or not. What is the previous question?

[fol. 32] (The question was read.)

The Court: Answer the last question.
The Witness: Yes, sir.

Q. You did take bets?
A. Yes.

Q. And were you paid a commission on all the bets you took in your variety store?

A. I refuse to answer.

The Court: I will sustain that objection. Next question.

Q. How often did the defendant David Namet come to your store, Mr. Kahn?

A. I refuse to answer.

The Court: No, you may answer that.

The Witness: How often did he come to my store?

Q. How often did he come to your store?

A. A couple of times a week.

Q. No more than that?

A. No.

Q. Isn't it a fact that he came once in the morning and once in the afternoon?

A. No, sir.

Q. Every day of the week?

A. No, sir.

Q. Well, let's exclude Sundays. Monday through Saturday didn't he come to your store twice every day, once in the morning and once in the afternoon?

A. No, sir.

Q. Who did you accept the bets for that you took in your variety store?

A. I refuse to answer.

The Court: I will sustain that. Next question.

Q. Did you ever take bets for the defendant David Namet?

The Court: I will sustain an objection to that.

Mr. Redmond: I have no further questions, your Honor.

Mr. Fitzgerald: I have nothing.

The Court: Step down.

Mr. Redmond: The Government rests, your Honor.

The Court: All right, I will hear the defense.

Mr. Fitzgerald: Your Honor, I have a motion.

[fol. 33] The Court: Unless you are resting, I won't pass on it.

Mr. Fitzgerald: May this witness be sworn, please.

DAVID NAMET, Sworn

Direct examination.

By Mr. Fitzgerald:

Q. Will you please state your name?
A. David Namet.
Q. And you are the son of the defendant?
A. Yes.
Q. Where do you live, Mr. Namet?
A. 110 Bloomingdale Street, Chelsea.
Q. That is the same house in which your father resides?
A. Yes.
Q. The same building, the same flat where the Treasury Agents entered?
A. Yes.
Q. In March of 1960?
A. Yes.
Q. And you are a professional man, Mr. Namet?
A. Yes.
Q. What profession?
A. I am a lawyer.
Q. You are a member of the Massachusetts Bar?
A. Yes.
Q. And you hold a college degree, do you not?
A. Yes.
Q. From which college?
A. Boston College.
Q. And Mr. Namet—

Mr. Redmond: I will object to this, your Honor. I don't see what this has to do with it.

The Court: I will take care of it.

Q. Now, Mr. Namet, do you live with your father all the time?
A. Yes.
Q. And what is your father's means of support?
A. He is retired from the Massachusetts Department of Public Works and receives a pension from the Department of Public Works, and also a pension from the United States Government.

Q. And how old is your father?

A. 66.

[fol. 34] Q. Does your father have any other means of support?

A. He—

Mr. Redmond: My objection to this.

The Court: No, I will allow it.

The Witness: Sir, he runs errands around town, and also around election time he does some printing work for a—commission printing for a printer in Revere.

Q. Now, Mr. Namet, since these are in evidence I will produce them for you; these are cards of candidates for office, are they not?

A. Yes.

Q. Is that the kind of printing your father did?

A. Yes.

Q. Similar to this?

A. Yes, sir.

Q. And he goes between a—he takes his printing around for a local printer, does he?

A. Quality Press of Revere.

Q. Now, Mr. Namet, you have seen much of these envelopes and things put into evidence, without taking them all apart, containing old slips, and so forth. Have you ever seen those around your house?

A. Yes, they have been around there for a number of years, the cigar box.

Q. How long has that cigar box been around your house?

A. Quite a long time.

Q. And these pins, and so forth, are these all your father's?

A. Yes.

Q. And these pencils here?

A. Yes.

Q. Now, Mr. Namet, there was a sum of money found in your house. Could you explain the source of that money? Do you know the source of that money?

A. Yes.

Q. What is the source of that money?

Mr. Redmond: Could we specify what money we are talking about?

The Court: That is what I was going to ask.

Q. The money in the envelopes. There were three envelopes produced here. Where was that money kept in [fol. 35] your house?

A. It was kept in a cedar chest in my father's bedroom.

Q. And how long had that money been in the cedar chest?

A. About a year.

Q. And what was the origin of that money?

A. The proceeds of an insurance policy, my mother's insurance policy.

Q. Your mother had died previously?

A. About a year, yes, September of 1958.

Q. And this is the proceeds, the difference between what her burial cost and the money?

A. Yes, sir.

Q. Now, Mr. Namet, just putting the question to you very bluntly, is your father a bookie?

A. No, sir.

Q. Is he in the bookmaking business?

A. No.

Q. Does your father accept wagers of any kind?

A. No.

Mr. Fitzgerald: I have no further questions.

* * * * * * *

Mr. Fitzgerald: That is the defendant's case.

The Court: No rebuttal?

Mr. Redmond: No, sir.

The Court: How much time do you want to argue? About 15 minutes apiece?

Mr. Fitzgerald: Will your Honor entertain the motion at this point?

The Court: Yes. I am going to deny it. 15 minutes apiece for argument?

Mr. Redmond: I don't believe mine will be that long.

The Court: All right, I will hear arguments now.

I might say to the jury now that all of the evidence has been presented. What you have heard on the stand is the

evidence. Nothing that I say or the attorneys say is the evidence in this case, but what you have heard here is the evidence.

[fol. 36]

IN THE UNITED STATES DISTRICT COURT

CHARGE TO THE JURY

The Court: Now, Madam Foreman and ladies and gentlemen, it is my duty to charge you on the law of this case. And while I have the right to comment on the facts as I view them, I am not going to do that. I am going to leave the facts entirely to you to find.

And with that in mind, I want you to follow the law as I give it to you, regardless of how unfair you think the law is, or how improperly I interpret it. If I make an error, that can be corrected. If you make an error, that can't be.

Now, you have got a cold-blooded job here, which you [fol. 37] ought to approach without any prejudice or without any sympathy, and without any preconceived ideas of whether gambling is a good thing or not.

The Government, and the United States which brings this case, is not interested in bookmaking, except in so far as it produces tax revenue. Bookmaking is not a Federal crime, and never has been.

But the Government, to support itself, can levy taxes, and it has said that every man who is a bookmaker must pay an occupational tax of $50. And to make sure who owes that money, they have said also that everyone who is a bookmaker must register. Those are what the two counts say.

And there is no question that he did not pay the occupational tax, and there is no question that he did not register. That is admitted.

So that while we are not concerned with the crime of bookmaking as it exists in Massachusetts, we are concerned with the question of whether or not this man was a bookmaker for the purpose of determining whether he is liable for this tax and liable to register.

Now, the best thing that you can use in deciding this case is your own good common sense. I am going to tell you what the law is as you approach the exercise of your com-

mon sense, but that is probably your greatest asset in [fol. 38] deciding this case.

Now, the Government brings this case after this surveillance that you have heard about. After having gathered the evidence, they have brought this case before you charging that this defendant did not register and did not pay an occupational tax, he being liable for both. And there is no question, as I have said of whether or not he paid or registered; he didn't. The question is was he a bookie and liable.

Now, since that is the gravamen of the case, the burden is on the Government to prove that this man was a bookie under the law as I will shortly give it to you, and their burden is to prove it to you beyond a reasonable doubt. I am going to read something now to you that an upper court has said was good law and good instructions (reading):

> "In criminal cases the law presumes that persons charged with crime are innocent until they are proven by competent evidence to be guilty. To the benefit of this presumption of innocence the defendant is entitled, and this presumption stands as his sufficient protection unless it has been removed by evidence proving his guilt beyond a reasonable doubt. The burden is on the Government before the defendant can be convicted, of [fol. 39] establishing every essential element of the crime charged beyond a reasonable doubt.
>
> "A reasonable doubt of guilt is a doubt growing reasonably out of the evidence or the lack of it. It is not a captious doubt, not a doubt engendered merely by sympathy for the unfortunate position of the defendant or by a dislike to accept the responsibility of convicting a fellow man.
>
> "If having weighed the evidence on both sides you reach the conclusion that the defendant is guilty to that degree of certainty that would lead you to act on the faith of it, you may properly convict him.
>
> "Proof beyond a reasonable doubt is not proof to a mathematical demonstration. It is not proof beyond the possibility of a mistake. If such were the standard of evidence required, most criminals would go unwhipped of justice".

Now in the first place, you must not draw any inference from the fact that the defendant himself did not take the stand. He doesn't have to. He can sit mute and stand or fall upon the Government's case. Or he may take the stand [fol. 40] as he wishes. But from the fact that he didn't take it, you should not draw any inference against him.

Nor should any inference be drawn against him because the Kahns refused to testify, unless it would be a logical inference that would appeal to you as having a direct bearing upon the defendant's guilt.

Now, the layman seems to think that circumstantial evidence is a second-class kind of evidence. It is not. Circumstantial evidence is just as good as direct evidence if it has that impact upon your mind that would exclude every other reasonable hypothesis except the one of guilt.

Many crimes are committed in secret, and it isn't always possible to have a witness who sees a crime committed, particularly a crime that has a chain of events in its natural execution. So that when I say to you that circumstantial evidence is just as good as direct evidence, I say that to you in full sincerity, and it is the law.

Now, to start off with, you have heard the story of the expert, and counsel for the defense agreed he was an expert on how bookies operate. Even I learned something from him. He told you how they have pickup men who are salaried employees, really messengers who are no part of the betting transaction; they are merely messengers who pick up slips and money and transport it to the man who is really taking the bets.

[fol. 41] And he emphasized how they do business, what times the monies are collected and what times the payoffs occur. You have heard how he described the whole operation, and I should think the question that you have got to ultimately decide is how well the activities of this defendant fitted into that program defined and outlined by the agent.

You have a lot of other evidence that you want to fit into that picture. You have the evidence of the slips that were found in Namet's home. Were they bets, or were they just notations of one kind of another that had accumulated?

You have the money, which is explained as being the proceeds of an insurance policy, I think the young man said about a year ago.

And how does that fit into your conception of what a normal person does when they receive insurance money. Do they keep it in the house for a year? Do they bank it? Do they distrust banks and keep it there?

You have the types of money. You will see it. You will have it with you if you want it. You will see the species and the denominations. How well does that fit in with the story of insurance?

You have the reputations of the stores that this defendant visited. You have the story of the regularity. You have the story that has been argued to you of Namet in the [fol. 42] smoke shop and he wouldn't do business until the agent had left there. You have all of these things. And on those things the Government asks you to find this defendant guilty.

Now, if you are satisfied from all of the evidence that you have heard that Namet was really a bookmaker, then your answer to both of these counts in the indictment must be guilty.

On the other hand, if you find that he was not a bookie, that all of this evidence that has been presented to you does not drive you to a conclusion that he was, then you would find him not guilty.

You will have the evidence, and I am going to have the money sent to you, also, all of the evidence. I suggest that the Foreman take charge of the money, not that anyone would steal it, but for fear that if anyone did you would all be accused. And you go out and decide whether this man is guilty.

There are two counts. I don't see how you could find him guilty on one and not guilty on the other, or not guilty on one without finding him not guilty on the other. It will stand or fall pretty much on the question of was this man a bookie. If he was, he is guilty. And if he wasn't, he is not. [fol. 43] If there are any requests for further instructions, or I will now see counsel for any suggestions of errors or omissions.

(Conference at the bench at which the following was recorded:

Mr. Fitzgerald: I wonder if you would end on the note that you did; you said if they found he was a bookie he was guilty, but also, and our Supreme Court has so stated, that if he was merely a pickup man he must be found not guilty.

The Court: I have passed on that. I have said that. I have told them about the pickup man. I covered that in my charge.

Mr. Fitzgerald: I know you just referred to it once, but I thought on ending it up.

The Court: I can't end up more favorable to you.)

The Court: Now I will ask the jury to retire, and you can send for the exhibits if you want them.

(The jury retired to deliberate, and later returned with a verdict of guilty on both counts.)

The Court: Thank you very much. I think that was a just verdict. You are now excused until next Tuesday at 10:00 o'clock.

* * * * * * *

[fol. 44] ROBERT A. SAWTELLE, Sworn

Direct examination.

By Mr. Redmond:

* * * * * * *

Q. Will you describe a bookie operation to the jury?

A. Well, a bookmaking operation generally is conducted through retail outlets, so to speak, and these retail outlets are operated by persons, or those operators allow other persons to come on the premises for the purpose of accepting number pool or horse bet wagers from patrons coming into the premises.

On other occasions they may sell Treasury balance lottery tickets, but a wager regardless.

They accept the bet from the retail customer and take the money, give the customer a copy of the bet slip, they keep a copy of the bet slip, they hold those betting slips

and the money until a person contacts them to collect the bet slips from them.

And those bet slips are held by the principal in this operation, one who may have any number of retail outlets, until the outcome of those bets are determined, either the horse runs and wins, or it loses, or the number wins or loses, whatever it may be.

He takes this material generally to a location where he examines it for duplication of bets, and that would be where more than one person places a bet on the same horse, or more than one person places a bet on the same number.

The heavier the bets concentrated on a single race may be, the more risk to him of going broke if it hits. So when he realizes through tallying his play that he is overloaded on bets for a certain number or bets for a certain horse, [fol. 45] he will telephone to a layoff man. That is what he calls insuring his play.

So if he has a total of $50 on a certain horse, and he can't afford to pay off if the $50 is hit, he will bet himself to a layoff man, probably $10, $20, $30 of that money, and then if that horse or number does come in, he not only has won the money from the layoff man to cover his bets or loss, but he may have realized a profit for himself, too.

So when the outcome of the event, of the number or whatever the bet may be, has been determined, which is generally in the late afternoon or evening of the day the bets are made, he then has to reckon up with an examination of the bets that his agents have collected for him, to determine how many hits he has had, what the locations are that these hits came out of.

He has to set up his payoff envelopes, designating the initials of the hitter, the store, or whoever he took the bet from. He sets up these payoff envelopes and does the accounting at night.

The next morning there is a distribution of these hit monies made to the retail outlet, so when the customer comes in the next day and claims his payoff from the win of the day before, they have the money to pay him off.

In the nutshell, that is the way this type of operation, or how the number pool operation, or a horse bet operation, would function.

Q. Where would the pickup man come in?

A. The only place you have a pickup man in these organizations is where you have generally a large number of retail outlets where the bets are taken, and the principal cannot service all of these places himself, and still protect himself through analyzing the stuff and making his layoff insurance bets, and so forth.

In a case like that, they hire a pickup man or a runner. A pickup man or a runner is strictly a salaried messenger. [fol. 46] He gets no commission. Win, lose or draw in the operation, he still gets his week's pay. He has no concern and no proprietary interest in the way the thing operates.

So the pickup man merely goes out and collects this material, he does not collect the money, and brings the material to his principal, or to a place designated by his principal, and drops it.

He doesn't stay with it, he has no interest in it other than picking it up and delivering it where he is told to deliver it.

And on a given period, week or month, he gets settled up on a salary basis. Pickup man and runner are synonymous.

Q. Does he handle money between the principal and agent?

A. No, nor does he handle any settlements on the payoffs, merely picking up.

Mr. Redmond: I have no further questions at this time. I would like to be able to recall this witness as to the day of the actual raid.

The Court: Do it right now. I am not going to have this recalling.

Mr. Redmond: All right.

Q. I direct your attention, Mr. Sawtelle, to March 19, 1960. Were you in Chelsea on that day?

A. I was, yes, sir.

Q. Tell us what you did in Chelsea that day, Mr. Sawtelle?

The Court: Now, this is with regard to this defendant?

Mr. Redmond: That is right, your Honor.

The Witness: The first thing I did in Chelsea was to move into the area at a given time, in order to pick up the trail of Mr. Namet where he should be at that hour.

However, on this day when I moved into the area where he had been at that time on every other day I had been there, he wasn't there.

But the automobile he drove every day was parked un- [fol. 47] occupied on Amory Street off Bellingham Square, behind the City Hall.

So I saw the vehicle parked there, and the synchronized raids were for 1:00 o'clock, and my orders were to have followed Mr. Namet and at 1:00 o'clock apprehend him, and seize the automobile, an administrative seizure of the car he was driving.

So I took up a position near the car and stayed there until 1:00 o'clock, and nobody came to the vehicle in a period of a half to three-quarters of an hour.

I went over to the vehicle, the door was open, and I tied a prepared seizure tag on the steering wheel of the car.

And there were no keys in the vehicle, so I had to leave it there.

I then drove up to Namet's house at 110 Bloomingdale Street, or Avenue, and the Deputy Marshal and a group of special agents had already entered the premises with a search and arrest warrant, and both warrants had at that time been executed.

When I walked into the kitchen, David Namet was seated at a table, and he was being interviewed by Special Agent Edgerley of my group, and other agents were assisting Deputy Marshal Mahoney in a search of the premises. This was some time between five and ten past 1:00.

When I entered, Agent Edgerly advised me that he had some other business to attend to, and asked me to take over and resume interviewing David Namet, which I did.

During the course of that interview, I advised Mr. Namet of his Constitutional privileges with respect to self-incrimination, and his right to counsel, and asked him personal background questions, which he answered readily.

I asked him if he was aware of the requirements of the Federal Wagering Tax Statutes that a person engaged in the business of accepting wagers for himself or on behalf

of another was liable for the registration and the purchase [fol. 48] of a Federal Wagering Tax Stamp, and he advised me that he was so aware.

I questioned him likewise with respect to the ten per cent wagering excise tax in the instance of a principal in a wagering operation, and he advised me that he was aware of that also.

He denied that he was liable for either of the taxes mentioned, and he stated that he was not a bookie.

Deputy Marshal Mahoney had requested him in my presence to empfy out his pockets, and requested me to make an inventory of the contents of Namet's pockets.

I believe I found that his pockets contained $186.34 in bills and coin. He had three slips of number pool wagers on his person, and other personal effects.

The Special Agents who were conducting the search of the premises brought their findings to the attention of Marshal Mahoney, and the Marshal brought the material out and put it on the kitchen table, where we evaluated the findings.

And from a bedroom there was a quantity of money, I believe, in excess of $800, brought out, that was found in three bundles of seven hundred, an envelope containing 75, and another envelope containing 50. It was 825.

They also brought out a quantity of daily double horse bet slips showing the first and second numbers of the two horses running, and the amount of the wager.

From memory there were about a dozen or more of those slips, and each slip contained about a half dozen to ten daily double horse-bets.

They also brought out miscellaneous half price number pool cards. Those are printed cards dated for a given six month period of the year, and they are general equipment used in the operation of a number pool betting operation.

They are prepared from a history of betting experience where certain numbers in a three-number combination hap- [fol. 49] pen to hit on a frequent basis, and therefore they cause a hazard to the operator of the pool.

They realize these numbers come out often, so they call them half price numbers. Where a given number pays 600 to one odds, these half price numbers are cut in half and

they pay off 300 to one. There were some of those found there.

Further, there were some miscellaneous envelopes and miscellaneous paper, pieces of paper that were covered front and back with number pool bets.

There was another brown manila envelope, on the face of which was written "Davey", and front and back literally covered with daily double results covering a long period of time.

I questioned Mr. Namet about the meaning of these slips, if he denied being a bookie what was he doing with them. At that time, his son David, Jr., who is an attorney, entered the premises and advised his father not to answer any further questions.

I concluded the interview and reported for other raids in the area. And that is about it, sir.

Mr. Redmond: I have no further questions, your Honor.

* * * * * * *

[fol. 49A]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

No. 60-303-S Criminal

UNITED STATES OF AMERICA

v.

DAVID NAMET

JUDGMENT AND COMMITMENT

On this 23d day of October, 1961 came the attorney for the government and the defendant appeared in person and[1] by counsel,

---

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

It Is Adjudged that the defendant has been convicted upon his plea of[2] not guilty and jury verdict of guilty of the offense of engaging in the business of accepting wagers, and in receiving wagers for or on behalf of a person liable for the tax on wagers imposed by 26 U.S.C. 4411, having wilfully failed to pay the special occupational tax due and owing to the United States; in violation of 26 U.S.C. 7203—Count 1; and engaging in the business of accepting wagers and in receiving wagers for or on behalf of a person liable for the tax on wagers, wilfully failing to register as required by 26 U.S.C. 4412; in violation of 26 U.S.C. 7203—Count 2, as charged[3] in Information—2 Counts—and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] four (4) months and to pay a fine of one thousand (1,000) dollars; execution of sentence stayed for two (2) weeks for appeal.

It Is Adjudged that[5]

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Mar-

---

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

shal or other qualified officer and that the copy serve as the commitment of the defendant.

George C. Sweeney, United States District Judge.

The Court recommends commitment to:[6]

[fol. 50]

PROCEEDINGS IN COURT OF APPEALS

On April 4, 1962, this cause came on to be heard and was fully heard by the Court, Honorable Peter Woodbury, Chief Judge, Honorable Bailey Aldrich, Circuit Judge, and Honorable Francis J. W. Ford, District Judge, sitting.

Thereafter, on April 23, 1962, the following opinion was filed:

[6] For use of Court wishing to recommend a particular institution.

[fol. 51]

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 5924.

DAVID NAMET, Defendant, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before Woodbury, Chief Judge, Aldrich, Circuit Judge, and Ford, District Judge.

John H. FitzGerald for appellant.

Paul J. Redmond, Assistant U. S. Attorney, with whom W. Arthur Garrity, Jr., United States Attorney, was on brief, for appellee.

OPINION OF THE COURT—April 23, 1962

PER CURIAM. An examination of the record discloses no error warranting vacation of the judgment below.

Judgment will be entered affirming the judgment of the District Court.

[fol. 52]

JUDGMENT—April 23, 1962

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

Roger A. Stinchfield, Clerk.

Approved:

Peter Woodbury, Ch. J.

Thereafter, on May 4, 1962, mandate was stayed.

[fol. 53] Clerk's Certificate (omitted in printing).

[fol. 54]

SUPREME COURT OF THE UNITED STATES

No. 134—October Term, 1962

DAVID NAMET, Petitioner,

vs.

UNITED STATES

ORDER ALLOWING CERTIORARI—October 15, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT, U. S.

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FILED
MAY 21 1962
JOHN F. DAVIS, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1962

No. 134

DAVID NAMET,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

JOHN H. FITZGERALD,
Attorney for Petitioner.

1 State Street,
Boston 9, Mass.

Supreme Court of the United States.

DAVID NAMET,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

1. The petitioner was convicted after a jury trial in the United States District Court for the District of Massachusetts of engaging in the business of accepting wagers without having registered and without having had or paid the special occupational tax imposed by 26 U.S.C. 4411, 4412 and 7203. An appeal was heard by the United States Court of Appeals for the First Circuit, which, after argument on briefs, *per curiam,* entered judgment affirming the verdict and judgment of the District Court.

2. The petitioner petitions for a writ of certiorari contending that the United States Circuit Court of Appeals for the First Circuit in its *per curiam* decision dated and entered April 23, 1962, sustaining the verdict of the District Court dated October 4, 1961, upon which judgment was entered on October 31, 1961, is in conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit in the case of *United States* v. *Maloney,* 262 F. 2d 535 (1959), on the same matter, which, under Rule 19 of the Rules of Supreme Court of the United States, is sufficient to confer jurisdiction upon this Honorable Court.

3. The question specifically presented for the review of this Honorable Court is that the United States District Court for the District of Massachusetts erred in permitting, over the petitioner's repeated objections, Irving Kahn and Annette Kahn, a husband and wife who had pleaded guilty in a similar but separate case involving the same crime, to testify, when the Court and the prosecution knew in advance that both witnesses had been apprised of their rights by counsel and also knew in advance of both witnesses' taking the witness-stand that the witnesses would claim their privilege against self-incrimination under the Fifth Amendment of the Constitution of the United States.

4. The petitioner was arrested in his home on March 19, 1960, by a United States Marshal, accompanied by several Special Agents of the Internal Revenue Service. Prior to this time agents of the Internal Revenue Service had the petitioner under surveillance on several occasions, observing each time that the petitioner was at the same variety or cigar store or his house at approximately the same time of day, travelling, when weather permitted, by automobile, all the time attired in a knee-length overjacket with patch pockets on either side. He remained in each establishment from fifteen seconds to two minutes. Among the establishments he was sometimes observed visiting was a variety store operated by the aforementioned Kahns. No agent could testify that he had ever seen the petitioner receive a wager, or place a wager for that matter, even though the places he visited were alleged to have a reputation for accepting wagers. The petitioner had no proprietary interest in any of these establishments.

At the trial, over the objections of the petitioner's counsel, who was also counsel for the Kahns, the Court allowed the Government to summon both Kahns to the witness-stand, knowing that they intended to plead the privilege

of the Fifth Amendment. In most occasions the Court sustained the Kahns' invocation of the privilege and disallowed the Government's question in front of the jury, which subsequently returned a verdict of guilty of violation of provisions of Title 26 of the United States Code.

5. As argument in the petitioner's behalf, in *United States v. Maloney*, 262 F. 2d 535, 537 (1959), Judge Learned Hand stated:

> "When the witness claims his privilege, a natural, indeed an almost inevitable inference arises as to what would have been his answer if he had not refused. If the prosecution knows when it puts the question that he will claim the privilege it is charged with notice of the probable effect of his refusal in the jury's mind. . . . if they once do get before the jury, there arises . . . . a strong probability that they will be taken as evidentiary. . . . The interest of the accused should prevail over that of the prosecution and the judgment should not stand, for the question touched vital elements of the charge."

While the Kahns had pleaded guilty of the same offense with which the petitioner was charged, forcing them to take the witness-stand under the circumstances recited exposed them to further conceivable indictments, viz., conspiracy to violate these and other sections of the United States Code, possible bribery of a federal official, etc.

6. For the reasons herein specified, it is respectfully submitted that this Honorable Court should grant the petitioner a writ of certiorari.

Respectfully submitted,

JOHN H. FITZGERALD,
Attorney for the petitioner.

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JUN 8 1962
JOHN F. DAVIS, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1962

No. 134

DAVID NAMET,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

JOHN H. FITZGERALD,
Attorney for Petitioner.

1 State Street,
Boston 9, Mass.

[301 F. 2d 314.]

United States Court of Appeals for the First Circuit.

No. 5924.

DAVID NAMET,
DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Before WOODBURY, *Chief Judge*, ALDRICH, *Circuit Judge*, and FORD, *District Judge*.

John H. FitzGerald for appellant.
Paul J. Redmond, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

April 23, 1962.

PER CURIAM. An examination of the record discloses no error warranting vacation of the judgment below.

Judgment will be entered affirming the judgment of the District Court.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

(SEAL)

UNITED STATES OF AMERICA
v.
IRVING KAHN
No. 60-304-S CRIMINAL

On this 23d day of October, 1961, came the attorney for the government and the defendant appeared in person, and [1] by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of [2] Guilty of the offense of engaging in the business of accepting wagers, and in receiving wagers for or on behalf of a person liable for the tax on wagers, having wilfully failed to pay the special occupational tax as required by 26 U.S.C. 4411, due and owing to the United States; in violation of 26 U.S.C. 7203—Count I, and engaging in accepting and receiving wagers for or on behalf of a person liable for the tax on wagers, and having wilfully failed to register; in violation of 26 U.S.C. 7203. as charged [3] in Information—2 Counts—and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that [4] defendant be imprisoned for a period of one (1) year; execution of sentence suspended and defendant placed on probation for a period of two (2) years and to pay a fine of fifteen hundred (1500) dollars by 11 A.M. October 24, 1961 or stand committed.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

IT IS FURTHER ORDERED that the clerk deliver two certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

s/ GEORGE C SWEENEY
United States District Judge.

.....
Clerk.

A TRUE COPY. Certified this 31st day of October, 1961.
(*Signed*) JOHN A. CANAVAN (*By*) HELEN I. TWEEDY
Clerk. *Deputy Clerk.*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

(SEAL)

UNITED STATES OF AMERICA *v.* ANNETTE KAHN	No. 60-304-S CRIMINAL

On this 23d day of October, 1961, came the attorney for the government and the defendant appeared in person, and [1] by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of [2] Guilty of the offense of engaging in the business of accepting wagers, and in receiving wagers for or on behalf of a person liable for the tax on wagers, having wilfully failed to pay the special occupational tax as required by 26 U.S.C. 4411, due and owing to the United States; in violation of 26 U.S.C. 7203—Count I, and engaging in accepting and receiving wagers for or on behalf of a person liable for the tax on wagers, and having wilfully failed to register; in violation of 26 U.S.C. 7203, as charged [3] in Information—2 Counts—and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that [4] imposition of sentence be suspended and defendant placed on probation for a period of two (2) years.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding,

industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

IT IS FURTHER ORDERED that the clerk deliver two certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

s/ GEORGE C SWEENEY
United States District Judge.

.....
Clerk.

A TRUE COPY. Certified this 31st day of October, 1961
(*Signed*) JOHN A. CANAVAN (*By*) HELEN I. TWEEDY
Clerk. *Deputy Clerk.*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

(SEAL)

UNITED STATES OF AMERICA
v.
DAVID NAMET
No. 60-303-S CRIMINAL

On this 23d day of October, 1961 came the attorney for the government and the defendant appeared in person and [1] by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of [2] not guilty and jury verdict of guilty of the offense of engaging in the business of accepting wagers, and in receiving wagers for or on behalf of a person liable for the tax on wagers imposed by 26 U.S.C. 4411, having wilfully failed to pay the special occupational tax due and owing to the United States; in violation of 26 U.S.C. 7203 —Count I; and engaging in the business of accepting wagers and in receiving wagers for or on behalf of a person liable for the tax on wagers, wilfully failing to register as required by 26 U.S.C. 4412; in violation of 26 U.S.C. 7203 —Count 2. as charged [3] in Information—2 Counts—and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of [4] four (4) months and to pay a fine of one thousand (1000) dollars; execution of sentence stayed for two (2) weeks for appeal.

IT IS ADJUDGED that [5]

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ GEORGE C SWEENEY,
United States District Judge.

The Court recommends commitment to: [6]

.....,
Clerk.

A True Copy. Certified this 31st day of October. 1961

(*Signed*) JOHN A. CANAVAN (*By*) HELEN I. TWEEDY
Clerk *Deputy Clerk.*

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5924.

DAVID NAMET,
Defendant, Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

ORDER OF COURT

May 4, 1962

Upon motion of appellant, to stay mandate herein pending an application to the Supreme Court of the United States for a writ of certiorari, the same to be filed by the date prescribed by law, and notice of such filing to be filed promptly with the Clerk of this Court,

It is ordered that said mandate be, and the same hereby is, stayed.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk.

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CITATIONS

Case:

United States v. *Maloney*, 262 F. 2d 535 — 11

Constitution of the United States:

Fifth Amendment — 10

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 134

DAVID NAMET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (R. 48)[1] is reported at 301 F. 2d 314.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1962. The petition for a writ of cer-

[1] The record on file in this Court, consisting, *inter alia*, of the printed appendices to the briefs in the court of appeals as well as the opinion of that court, will be cited herein as "R." We are filing a typewritten transcript of the trial proceedings which will be cited as "Tr."

tiorari was filed on May 21, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner, along with Mr. and Mrs. Kahn, was charged with violation of the wagering tax laws. On the morning of petitioner's trial, the Kahns pleaded guilty. In his opening statement to the jury, the prosecutor indicated his intention to call the Kahns as witnesses (Tr. 4):

> Also, I have reason to believe that there will be testimony by a husband and wife that they did accept wagers as agents for [petitioner], that he was in fact their principal, and that he did not merely pick up slips from them on which they had accepted wagers, but I have reason to believe they will testify that he would settle with them each day on the accounts, on the bets, that they had taken the previous day.

Thereupon, defense counsel, who represented the Kahns as well as petitioner, advised the court and the prosecution that he had not waived any of the constitutional privileges of the witnesses and that they were entitled not to testify. Subsequently, the government called the Kahns as witnesses and, on the advice of counsel, each pleaded the privilege against self-incrimination to certain of the questions asked. The court suggested a preliminary examination out of the hearing of the jury but defense counsel failed to respond to the suggestion. No protective instruction was requested either at the time the witnesses refused to answer the prosecution's questions or as part of

the court's charge to the jury. In charging the jury, the court, *sua sponte*, stated (Tr. 102):

> Nor should any inference be drawn against [petitioner] because the Kahns refused to testify, unless it would be a logical inference that would appeal to you as having a direct bearing upon the defendant's guilt.

No objection was taken to the instruction in the trial court or in the court of appeals, and the petition makes no reference to it.

The *sole question presented by petitioner* is whether the government was precluded from calling the Kahns as witnesses by the knowledge that it was likely that each would plead the privilege against self-incrimination.

There lurks in the record the further question whether the trial court's instruction with respect to the inferences which the jury might draw from the Kahns' refusal to testify was not only erroneous but so prejudicial to the substantial rights of petitioner that the judgment should have been reversed by the court of appeals despite petitioner's failure to raise an objection in the trial court or to point out the error on appeal.

STATEMENT

Petitioner was charged in a two-count information with wilful failure to pay the special wagering occupational tax and with wilful failure to register prior to engaging in the wagering business (R. 4).

After a trial by jury, petitioner was convicted under both counts (R. 40). He was sentenced to imprisonment for a period of four months and fined the sum of $1,000 (R. 1).

No question is raised regarding the sufficiency of the evidence, which may be summarized as follows: On March 19, 1960, a United States Marshal and several Internal Revenue Service agents, carrying arrest and search warrants, arrested petitioner in his home (R. 44). They found three undated number pool wager slips (the copies customarily retained by the bookie) and $186.34 in his pockets (R. 21, 24, 45). They also found in his home a quantity of daily double horse-wagering slips, half-price pool cards used in a number pool betting operation and papers covered with number pool bets. Most of these papers were undated. Also seized in the house were three bundles of currency totalling $700 and two envelopes containing $75 and $50 (R. 45-46, 24-27).

Prior to petitioner's arrest, his daily activities had been observed by Internal Revenue Service agents. He was seen making morning and afternoon daily visits in Chelsea, Massachusetts, to variety and smoke shops reputed to be engaged in bookmaking (R. 18-19). On one occasion, when an agent was standing in a smokeshop, petitioner told its counterman that he would wait until the agent left (R. 20-21). Upon his arrest, petitioner admitted that he was aware of the registration and tax requirements of the federal wagering statute but denied that he was a bookie or liable for these taxes (R. 44-45).

The issues in this case arise out of the government's calling of Irving and Annette Kahn, husband and wife, as witnesses. The Kahns had been charged with substantive wagering tax violations and were represented by the same attorney as petitioner. On the day of petitioner's trial, the Kahns had pleaded guilty (R. 1-3). In his opening statement, the prosecutor related that he had reason to believe a husband and wife would testify that they accepted wagers as petitioner's agents and that petitioner in turn daily picked up wagering slips and settled the previous day's betting accounts with them (R. 4). When this statement was concluded, defense counsel stated at a bench conference that he understood that the prosecution was going to attempt to use the Kahns as witnesses. He asserted that "they are entitled not to testify in their own case" and that "I didn't waive any Constitutional privileges in their behalf" at the time they had pleaded guilty. When the court pointed out that the privilege against self-incrimination ceased upon their guilty pleas, defense counsel answered that their income taxes were under investigation by the Internal Revenue Service. The court replied that it would rule upon the claims of privilege, if made, when the witnesses took the stand (R. 6-7).

The government called Mrs. Kahn as it first witness (R. 7). A defense objection "to the use of this witness" was overruled (Tr. 7). After she testified that she and her husband were the proprietors of a variety store in Chelsea and had known the petitioner for two years "by sight," she was asked if they had some type of business relationship with petitioner. She

replied: "Our attorney advised us not to answer on the plea of the Fifth Amendment." Defense counsel then added, "[t]he defendant [sic] refuses to answer on my advice" (R. 7). The court ruled that the witness could be compelled to testify concerning the crime to which she pleaded guilty but would not be required to testify to anything that might convict her of conspiracy to commit that crime or that might convict her of other crimes. The court allowed defense counsel to consult with the witness and authorized him to signal the assertion of the privilege upon her behalf by simply rising in his chair (R. 8-13). Government counsel asked seven additional questions concerning the period of time the witness had operated the variety store and her knowledge of the federal wagering statute. All were answered without a claim of the privilege. When a defense objection based upon materiality was sustained, the questioning of the witness was terminated (R. 13-17).[2]

At this point government counsel informed the court that he would be unable to use the Kahns as witnesses and that they both might be excused (R. 15-16). Upon the court's suggestion that the government might make a mistake in excusing them, counsel revised his views and concluded that he "would just as soon proceed with both of them and see what [he] could do" (R. 16-17). After introducing the balance of his evidence other than the testimony of the Kahns, the prosecutor asked the court to adjourn the case to await a memorandum

[2] The government did not recall Mrs. Kahn to the stand.

on this issue. The judge adjourned the case until the next morning, remarking that he did not think that the prosecution could convince him that Mrs. Kahn could be compelled to testify if she said that an answer might incriminate her (R. 30):

> * * * If she says the evidence might incriminate her, I have got to go along with her.
>
> Probably, if I doubted her, I could examine her in private.

The next morning, without objection from petitioner, the court granted the government permission to call Mr. Kahn as a witness (Tr. 70). Mr. Kahn testified that he operated a variety store and knew petitioner. He stated, after the court overruled his refusal to answer on "advice of counsel," that he did not accept wagers and that he had had some dealings with petitioner in February and March 1960. The court then sustained the witness' refusal to relate the details of these dealings (R. 30-31). At this point, after the court overruled Mr. Kahn's refusal to answer whether he ever took bets in his variety store, defense counsel asserted, "I guess he is misinterpreting my standing up, your Honor." (R. 31). In a bench conference which followed, defense counsel referred to the signal arrangements established when Mrs. Kahn had testified. The judge replied that he would instruct the witness whether to answer and that no further signals should be given (R. 31). Mr. Kahn then testified that he had taken bets. He refused to answer whether he had been paid a commission on these bets. Upon being required to answer concerning the frequency of petitioner's visits, the witness stated

that petitioner came to his store a couple of times a week. He denied that petitioner made daily visits, twice a day (R. 32). The following then ensued (*ibid.*):

> Q. Who did you accept the bets for that you took in your variety store?
> A. I refuse to answer.
> THE COURT: I will sustain that. Next question.
> Q. Did you ever take bets for the defendant David Namet?
> THE COURT: I will sustain an objection to that.

No further questions were asked by the prosecution and the defense did not cross-examine the witness (R. 32).

Petitioner did not testify. In his defense, his son testified that his father was retired and ran errands around town. He said that the wagering slips and other papers seized from petitioner's home had been there for years in a cigar box. He claimed that the source of the money found by the agents was an insurance policy (R. 33-35).

In his summation, government counsel did not refer to the refusal of the Kahns to testify. In its instructions, the court charged, *inter alia* (R. 37):

> Nor should any inference be drawn against [petitioner] because the Kahns refused to testify, unless it would be a logical inference that would appeal to you as having a direct bearing upon the defendant's guilt.

Thereafter, the court, in its review of the evidence, made no mention of the Kahns but told the jury to decide the case on the evidence (R. 38-39). At the

conclusion of the charge, the court stated: "If there are any requests for further instructions, or I will now see counsel for any suggestions of errors or omissions" (R. 39). At the bench conference which followed, defense counsel did not object to the portion of the charge which related to the Kahns, although he did take an exception to another part (R. 39-40).

On appeal from his conviction, petitioner urged eight grounds for reversal, including a claim that the trial court erred in permitting, over petitioner's objections, the Kahns to testify, "knowing in advance that they would plead the Fifth Amendment" (Appellant's Brief, p. 1). Although petitioner attacked portions of the court's charge to the jury, his brief to the court of appeals made no reference to the instruction concerning the inferences which might be drawn from the Kahns' refusal to testify. The court of appeals affirmed the conviction, *per curiam*, stating (R. 48):

> An examination of the record discloses no error warranting vacation of the judgment below.

ARGUMENT

1. There is no merit to petitioner's sole contention—that the trial court erred in permitting the government to call the Kahns as witnesses when it had advance notice from their counsel (who was also counsel for petitioner) that each was likely to claim the privilege against self-incrimination. It is clear from the record that the Assistant United States Attorney acted in good faith in calling the witnesses

and that the trial court was careful to protect the rights of petitioner when the privilege was invoked (see Statement, *supra*, pp. 5-8).

The Kahns had pleaded guilty to wagering tax violations grounded in their relationships with petitioner. They were thus in a position to give valuable testimony for the government. In light of their guilty pleas, the Fifth Amendment, if claimed, might not support a refusal to answer all questions pertinent to the charges against petitioner. It was therefore proper for the court to permit the government to call the witnesses so that questions might be posed and rulings obtained, if the privilege was claimed. In fact, each of the witnesses, when called, freely answered several questions and when Mr. Kahn claimed the privilege as to others, he was only partially sustained and was required to answer a number which were clearly pertinent. Petitioner raises no issue here with respect either to the rejection of the claim of privilege or the admissibility of these answers. Nor does he attempt to justify his claim—which we believe unsound—that the notice of an intention to assert the privilege is sufficient to deny to the government evidence to which it is concededly entitled.

If petitioner believed that the invocation of the privilege by the Kahns would prejudice him, he had ample means of protecting himself. He could have requested a preliminary inquiry outside the presence of the jury to demonstrate that the witnesses would assert the privilege under oath and to identify the questions to which such claims would be asserted

and the extent to which such claims would be sustained by the trial court. In fact, the court suggested such a procedure prior to the appearance of Mr. Kahn (R. 28-30; see Statement, *supra*, p. 7), but defense counsel never responded to the suggestion. Had petitioner availed himself of this right, there would have been no refusals to answer in the presence of the jury and no possibility of the prejudice claimed. His failure to do so could not deny the government the right to call the witnesses or render the exercise of that right error. As an alternative means of protection, petitioner could have requested —but did not—a cautionary instruction following the claim of the privilege and as part of the court's charge to the jury.

Under the circumstances, we submit that the rulings of the trial court in permitting the government to call the Kahns as witnesses were correct. Nor do these rulings conflict in any way with the decision of the Court of Appeals for the Second Circuit in *United States* v. *Maloney*, 262 F. 2d 535, which, if anything, approved the government's right under such circumstances to call these persons as witnesses.

2. There is a second issue presented by the record, although not raised by petitioner in the trial court, in the court of appeals or in his petition for a writ of certiorari. Upon conclusion of the presentation of the evidence and the arguments of counsel, the court instructed the jury in part as follows:

> Nor should any inference be drawn against [petitioner] because the Kahns refused to testify, unless it would be a logical inference that would

> appeal to you as having a direct bearing upon the defendant's guilt.

This instruction, in our view, was mistaken insofar as it allowed the jury to draw any inference "bearing upon the defendant's guilt" from the fact that "the Kahns refused to testify." However, petitioner, who was represented by experienced counsel of his own choice, failed to object and to afford the trial court an opportunity to correct the matter. In addition, although eight different contentions of error were argued on appeal to the court of appeals, petitioner failed to raise any question with respect to this portion of the charge either in his brief or on oral argument. Finally, petitioner has failed to raise any question with respect to the instruction in his petition in this Court.

It is entirely possible that the court of appeals considered this specific portion of the charge but, having in mind petitioner's failure to raise the point by way of exception at the trial or assignment of error on appeal, decided that the error did not affect any of petitioner's substantial rights when viewed in the light of the arguments to the jury, the contents of the entire charge and the strong circumstantial evidence of guilt. On the other hand, there remains the possibility that petitioner's failure to point out the error resulted in its going unnoticed. For this reason we would not object to this Court's granting certiorari, if petitioner so requests, for the purpose of remanding the case to the court of appeals in order that that court may indicate whether it has ruled on the question and, if not, may determine

whether the apparent error in the charge requires reversal of the conviction despite the failure to raise the point and the strong evidence of guilt. The question does not merit the time and attention of this Court.

CONCLUSION

For the reasons stated, the government would not object to the grant of certiorari if petitioner requests a remand to the court of appeals so that it may determine whether the apparent error in the charge requires reversal of the conviction.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

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Supreme Court of the United States

OCTOBER TERM, 1962.

No. 134.

DAVID NAMET,
Petitioner,
v.
UNITED STATES.

PETITIONER'S BRIEF.

Opinion Below.

The per curiam opinion of the United States Court of Appeals for the First Circuit (Tr. 41) is reported at 301 F. 2d 314.

Jurisdiction.

The petitioner was convicted after a jury trial in the United States District Court for the District of Massachusetts (Tr. 1, 38) upon a two-count information charging him with wilful failure to pay the special wagering occupational tax and wilful failure to register prior to engaging in the wagering business (Tr. 4). He was sentenced to imprisonment for a period of four months and fined the sum of $1,000 (Tr. 38, 39). The judgment of the Court of Appeals was entered on April 23, 1962. The petition for a writ of certiorari was filed on May 21, 1962, invoking the juris-

diction of this Court under 28 U.S.C. 1254(1), and certiorari was granted by this Court on October 15, 1962, with the case being transferred to the summary calendar.

Question Presented.

The specific question presented is whether the United States District Court for the District of Massachusetts erred in permitting, over petitioner's repeated objections *ab initio*, Irving Kahn and Annette Kahn, a husband and wife—who had pleaded guilty in a similar but separate case involving a similar information—to testify before the jury, when the District Court and the prosecution were informed by defense counsel *ab initio* and in advance that each such witness would invoke his or her respective privilege against self-incrimination.

Underlying this question and encompassed therein is the further question whether the District Court's instruction with respect to the inferences which the jury might draw from the Kahns' refusal to testify was not only erroneous but also so prejudicial to the substantial rights of the petitioner that the judgment should have been reversed by the United States Court of Appeals for the First Circuit.

Further embraced within the specific question presented is the general conduct of the trial and the manner of questioning the Kahns on direct examination by the Government over the general objection to their testifying *ab initio*, in addition to many specific objections, which were sustained.

Statement of the Facts.

On March 19, 1960, the petitioner was arrested under a warrant in his home at 110 Bloomingdale Street, Chelsea,

Massachusetts, by a United States Marshal accompanied by several Special Agents of the Internal Revenue Service. Seized under a warrant of search was currency totaling $1,011.34, three *undated* number-pool slips from the petitioner's wallet, a quantity of pencils, ballpoint pens, unused pads of paper, telephone listing desk indices, miscellaneous political hand-out cards, and miscellaneous papers containing some numbers—*all undated*, except for two "half-number" give-away cards dated 1957 and 1958, respectively, and an envelope bearing a date of February (?) 1949—none of which dates were within the scope of the information.

Prior to his arrest a couple of Special Agents followed the petitioner on several occasions over a period of about a month, observing that the sixty-six-year-old petitioner was at his house, a variety or a cigar store at approximately the same time on those occasions, remaining in each for intervals varying from fifteen to forty-five seconds in the afternoon and from three to five minutes in the morning (Tr. 18). The petitioner travelled, weather permitting, in a bright red 1958 Ford, or on foot otherwise, all the time attired in a gray over-jacket, almost knee length, with patch pockets on either side of the over-jacket (Tr. 16). Sometimes he was observed visiting a variety store operated by the Kahns.

No agent could testify that he had ever seen the petitioner place a wager or accept a wager during this surveillance, even though some of the places the petitioner visited had a reputation for accepting wagers. The only observation made was that, when the petitioner visited these variety stores or cigar stores, his patch pockets had something in them (Tr. 16), but no witness could specify precisely what was in the patch pockets. The petitioner's son—a practising Massachusetts attorney who resided with the petitioner—testified that his father was not a "bookie" (Tr. 28); that

his father was pensioned from the Massachusetts Department of Public Works and also received a pension from the United States Government (Tr. 26); that his father, the petitioner, also ran errands around town and worked on a commission basis for the Quality Printing Press of Revere, Massachusetts (Tr. 27); that all of the physical exhibits taken from the petitioner's house had been around the house "for years" (Tr. 27); and, that the currency found in the house was the proceeds from his late mother's life insurance policy (Tr. 28). In all, nothing in the physical exhibits bore any date within the period encompassed by the Government's information.

Argument.

I. THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS ERRED IN PERMITTING, OVER PETITIONER'S REPEATED OBJECTIONS AB INITIO, IRVING AND ANNETTE KAHN, A HUSBAND AND WIFE,—WHO HAD PLEADED GUILTY IN A SIMILAR BUT SEPARATE CASE INVOLVING A SIMILAR INFORMATION—TO TESTIFY BEFORE THE JURY, WHEN THE UNITED STATES COURT AND THE PROSECUTION WERE INFORMED BY PETITIONER'S DEFENSE COUNSEL AB INITIO AND IN ADVANCE THAT EACH SUCH WITNESS WOULD INVOKE HIS OR HER RESPECTIVE PRIVILEGE AGAINST SELF-INCRIMINATION.

Prior to its opening and immediately at the conclusion of the Government's opening, petitioner's counsel conferred at the bench with the Court and the prosecution, to the effect that the Kahns would avail themselves of their constitutional privilege under the Fifth Amendment (R. 6). Despite this the Court allowed the prosecution to call first as its witness Annette Kahn, who was also represented

previously (Tr. 2) by petitioner's counsel. Upon petitioner's first specific objection, in addition to his general objection *ab initio* (R. 7), the Court again conferred with counsel at the bench, and throughout the trial continued to confer with both attorneys—both in the Court's lobby and at the bench—on numerous occasions with which the transcript is replete concerning the contention of defense counsel that the Court should not force the Kahns to testify at the Government's behest as the Government's witnesses.

The transcript reflects manifestly the District Court's pervading awareness of the perils involved, viz.:

> (1) "As to the commission of any other crimes no, she cannot be [compelled to testify]; she has a right to claim the Fifth. But you have got to proceed on it slowly because— . . .
>
> "Now, I want you to be very careful not to bring in the commission of any other crimes, or ask her any questions which would relate other than to . . ." (Tr. 7, 8.)
>
> (2) "The Court [to attorney Fitzgerald for the defense]: I want you to consider another practical aspect of this. I know you are in a spot with separate defendants, but if she is going to claim the Fifth Amendment and the Court sustains her, when it comes to the disposition of her case she can't claim that she cooperated with the Government." (Tr. 8.)
>
> (3) "The Court [to the prosecutor]: Well, you have got a question—I am going to be very careful that she doesn't lend herself to a charge of conspiracy.
>
> "Now, conspiracy is a separate crime. You haven't charged it against either one of them here, and I can't let her testify to anything that will convict her of conspira[illegible], or lay her open to it.

"She has a right to claim the Fifth Amendment on that." (Tr. 9.)

(4) "Mr. Redmond: These statements were made not in the presence of the defendant, so that I have to convict Namet out of the Kahns' mouth.

"Mr. Fitzgerald: But you can't make them say any statements against him [i.e., Namet] that were not said in his presence.

"Mr. Redmond: I am not going to go through the conversation.

"The Court: I don't see how you can bring that evidence in without laying her open to a charge of conspiracy. She has a right to claim the Fifth . . .

. . . . . .

". . . In other words, if they [i.e., Kahns] testified to these things, it would be perfectly easy for you to go to a grand jury and get an indictment on a charge of conspiracy and they would have no—have you talked this over with Mr. Garrity?" (Tr. 11.)

(5) "The Court [to the prosecution]: Why don't you take the Kahns off the stand and use your other testimony?" (Tr. 12.)

Then, despite the foregoing consuming colloquies and recesses for the benefit of the Government, the Court still allowed the Government to recall to the witness-stand and to resume questioning Mrs. Kahn. Further bench discussion followed upon defense counsel's objections, continuing to manifest the Court's understanding of the peril—all in front of the jury:

(6) "Mr. Fitzgerald: I shall object to any further questions along this line, Your Honor.

"She is not on trial here.

"The Court: That is right. I will sustain the objection to that. You [i.e., the prosecution] had better proceed with your other witnesses.

. . . . . .

"Mr. Redmond: It is obvious I am not going to be able to proceed with these two witnesses [i.e., the Kahns].

"The Court: That is the way you [i.e., the Government] came in to court, until they decided to plead, so why don't you try the case that you had without them.

"Mr. Redmond: There is some question as to how strong our case is without them [i.e., the Kahns].

"The Court: Well, if you haven't got a case, drop it." (Tr. 13-14.)

After the immediately foregoing colloquy, wherein both the Court and the Government virtually conceded that the Kahns could not be used as Government witnesses, through their invocation of the Fifth Amendment, and when defense counsel asked that they be excused, the Court interceded as follows:

(7) "The Court [to the prosecutor]: . . . I think you may have made a mistake letting the Kahns go. I think you had better keep them until 2.00 o'clock. . . .

. . . . . .

"Or can you let one of them go home?

. . . . . .

". . . You may be criticized downstairs if you let them go." (Tr. 15.)

"Mr. Redmond: I don't like to be harsh. I would just as soon proceed with both of them [i.e., the Kahns], and see what I could do.

"Mr. Fitzgerald: Well, I would object.

. . . . . .

"The Court: Why don't you do this? Keep the Kahns here, but go right down and talk to him [i.e., U. S. Attorney Garrity] now, so you can tell Fitzgerald whether you want them or not. . . ." (Tr. 15.)

Thereafter the trial continued with Internal Revenue Special Agents as witnesses, until later at the bench there was more colloquy over the Government's use of the Kahns as witnesses:

(8) "The Court [to the prosecution]: I don't think you are going to be able to convince me about the Kahns, but I don't want to shut you off. . . ." (Tr. 22.)

(9) "The Court [to the prosecution regarding Annette Kahn's testimony]: No, I assume what she means to say is she doesn't want to testify because that may incriminate her.

"Mr. Redmond: All right, fine.

"The Court: She [i.e., Annette Kahn] doesn't have to specify why. All she has to say is that. At the moment I don't see how you can avoid a charge that anything she says might incriminate her if a charge of conspiracy was brought against her. Amongst other things; I just mentioned conspiracy.

"She may refuse to testify on the ground that it might show there was some bribery present, that she was operating a mission for some people. I don't know what the crime might be. If she says the evidence might incriminate her, I have to go along with her. . . ." (Tr. 22-23.)

Following another of many Government recesses, and, despite the general objection of defense counsel *ab initio* in addition to objections registered at the many bench and lobby conferences between the Government, defense counsel and the Court (as evidenced in part by 1 through 9, above), the Court permitted the Goverment to call Irving Kahn to the stand as its last witness (Tr. 23). On no less than eight occasions Irving Kahn invoked his privilege under the Fifth Amendment (Tr. 23, 24, 25) during his brief testimony to "testifying-type" questions directed by the Government in front of the jury, which almost led the witness into perjury (Tr. 23, 24) through his misinterpretation of his counsel's signal, which was prearranged with the Court.

Consequently, after leading off with Annette Kahn, the Government ended its direct evidence with Irving Kahn, leaving the jury to conjure what the answers to the Government's questions would have been had the Kahns' invocation of the Fifth Amendment privilege not been sustained for the most part by the Court, and raising the quaere as to what effect their mere presence on the witness-stand as forced Government witnesses had on the jury's minds, particularly when the Government pursued its conviction for bookmaking (Tr. 7, 23, 24, 25)—forced to be admitted by the Government's last witness, Irving Kahn—particularly in connection with whatever conjectural association they had with the defendant, David Namet, in the instant case. It is submitted that an undercurrent had to lurk in the jury's minds that they could infer that the petitioner was guilty through association with the Kahns.

Such extended examination of a witness who was a defendant in a similar trial, whose refusals to incriminate himself plant in the jury's mind the prosecution's theory of the crime not yet substantiated by evidence, causes reversible error, even though a cautionary admonition to disregard is given. See 45 West Virginia Law Review 596, 598 (May,

1959); also *Washburn* v. *State*, 164 Texas Criminal 448, 299 S.W. 2d 706 (1956).

The petitioner relies chiefly on the opinion of Mr. Justice Learned Hand in *United States* v. *Maloney*, 262 F. 2d 535, 537 (1959), wherein the Court stated:

> "When a witness claims his privilege, a natural, indeed an almost inevitable, inference arises as to what would have been his answer if he had not refused. If the prosecution knows when it puts the question that he will claim the privilege, it is charged with notice of the probable effect of his refusal on the jury's mind. . . . Such refusals have been uniformly held not to be a permissible basis for inferring what would have been the answer, although logically they are very persuasive. . . . It is clear, not only that the presumed answer has not the sanction of an oath, but—what is even more important—that the accused cannot cross-examine. . . . If they once do get before the jury, there arises, as we have said, a strong probability that they will be taken as evidentiary . . . and it seems to us that the interest of the accused should prevail over that of the prosecution, and that the judgment should not stand, for the question touched vital elements of the charge. . . ."

In the instant case the petitioner contends that there is no question but that the Court and the prosecution, after advance advice that the Kahns would avail themselves of the Fifth Amendment, knew full well of the perilous and prejudicial course towards which the prosecution was navigating the evidence and the trial through the use of the Kahns as witnesses, so much so that no instruction by the Court, admonishing or otherwise, could cure such damaging inferences created for a lay jury. Once the Kahns

were forced to the stand, the irreparable damage was done, since the prosecution's theory of the crime was inferentially implanted in the layman jury's mind, even though the same was not substantiated by the evidence. See 45 Virginia Law Review 596 (May, 1959).

> ". . . [the] rule is compelled by the nature of the privilege. If a person is constitutionally protected from being forced to give testimony which may be used against him in a prosecution for a crime, such protection would be illusory if the very act of asserting the privilege constituted an admission of incriminating facts which could be used as evidence against him in a criminal case. . . ." Ratner, Consequences of Exercising the Privilege Against Self-Incrimination, 24 University of Chicago Law Review 472, 473 (1957).

Many authorities contend that an adverse inference is not only likely to arise, but is inherent in the fact that the privilege is claimed. Professor Wigmore states:

> "Logic is logic ever since the days of the One-Hoss Shay; and it is on that score impossible to deny that the claim of the privilege involves a confession of the fact. . . . An attempt to enlist the layman in the process of nullifying his own reasoning powers is merely futile, and tends towards confusion and a disrespect for the law's reasonableness." 8 Wigmore 2272 (3d Edition, 1940).

Again, in *Ullmann* v. *United States*, 350 U.S. 422, 428 (1956), the Court held:

> "No doubt the constitutional privilege may, on occasion, save a guilty man from his just deserts. It is aimed at a more far-reaching evil . . . Having had

> much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses by law-enforcing agencies."

The *Ullmann* case was quoted with approval by Chief Justice Magruder in *United States* v. *Maffie*, 209 F. 2d 225, 227:

> "Our Forefathers, when they wrote the provision into the Fifth Amendment of the Constitution, had in mind a lot of history which has largely been forgotten today. . . . They made a judgment and expressed it in our funamental law, that it were better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused . . ."

While it is submitted that, although the petitioner was not himself forced to testify, nor could he be, nevertheless the very fact that the Kahns, who through ingenious questioning were associated to him after their professed guilt and with the assistance of their claim of privilege under the Fifth Amendment, created an irreparably harmful illusion in the jury's minds in that the Kahns' very act of asserting the privilege constituted an admission of incriminating facts which could be used as damaging evidence against the petitioner although not subject to thorough cross-examination. The Kahns could have been indicted for conspiracy, conceivable bribery of a federal official, or in connection with several other federal crimes, had their claim of the privilege not been sustained. See *United States* v. *Chase*, 281 F. 2d 225, 229 (1960), where the Court stated:

> "Also a determined effort was made by the prosecuting attorneys to have the Defendants implicate others

> in the robberies. If the prosecution desired, there appears no reason why a 'conspiracy' could not have been brought . . ."

Throughout the trial of this matter the Court repeatedly expressed an understanding awareness of the perilous position into which it had placed the Kahns; yet the Court maintained an abiding refusal to exercise its judicial authority forthrightly in sustaining the petitioner's counsel (who was also the Kahns' counsel) in his contention under the *Maloney* rule that the Kahns ought not to be permitted to take the stand. Instead, the Court appeared to make large concessions to the Government in order to extricate some evidence out of the Kahns in an effort to build up, in whole or in part, with the assistance of enforced disclosures, a case which the Government readily admitted:

> "There is some question as to how strong our case is without them [i.e., the Kahns]" (Tr. 14)—

all of which made futile any objections by petitioner's counsel which were sustained.

II. The United States District Court for the District of Massachusetts was Not Only Erroneous in its Instruction with Respect to the Inferences the Jury might Draw from the Kahns' Refusal to Testify, but was Also Prejudicial to the Substantial Rights of the Petitioner so that the Judgment should have been Reversed by the United States Court of Appeals for the First Circuit.

In its charge to the jury at the conclusion of the testimony the Court admonished the jury as follows:

> "Nor should any inference be drawn against him [i.e., the petitioner] because the Kahns refused to

testify, unless it would be a logical inference that would appeal to you as having a direct bearing upon the defendant's guilt." (Tr. 31.)

This is a plain error which the reviewing Court may notice under the provisions of the Federal Rules of Criminal Procedure, Rule 52(b).

Counsel further submits that, in view of his general objection *ab initio* to the Government's calling of the Kahns to the stand, which was overruled by the Court, and which it is contended should have been sustained, such an instruction or admonition to the jury would have been unnecessary in the first instance.

As in the *Maloney* case (*supra*), the analytical dilemma is that the acknowledgment that an unrequested admonition —which Justice Hand admits to be of questionable utility —will cure an error so gross that it affects the substantial rights of the defendant. As the concurring opinion in *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949), so aptly states:

> ". . . The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction. . . ."

Nor is a witness's refusal to testify on grounds of self-incrimination a proper basis of evidence in a criminal trial, as the Court's instruction misled the jury to believe. *Billeci* v. *United States*, 184 F. 2d 394, 398. *Commonwealth* v. *Ries*, 337 Mass. 565, 150 N.E. 2d 527 (1958). See 8 Wigmore 2272 (*supra*).

Again, in the *Maloney* case, at page 358, Justice Learned Hand states:

> "As *res integra* it is doubtful whether such admonitions are not as likely to prejudice the interest of the

accused as to help them, imposing, as they do, upon the jury a task beyond their powers: i.e.—a bit of 'mental gymnastics', as Wigmore 2272 calls it, which it is for practical purposes absurd to expect of them."

It is tantamount to a judge telling a jury not to consider the confession or admission of defendant A in deciding the guilt of defendant B tried at the same time. *Delli Paoli* v. *United States*, 352 U.S. 232.

Consequently, with the Government opening its direct evidence with Annette Kahn and closing its direct evidence with Irving Kahn, both of whom availed themselves of their privilege against self-incrimination with the prior knowledge to that effect of the prosecution and the Court, and over the general objection of counsel *ab initio*, efforts of counsel through objections, production of the petitioner's son—a licensed practising attorney who lived with the petitioner—summation to the jury, or request for any sort of admonition, by way of instructions to the jury, were and would have been futile to overcome the irreparable damage to the petitioner's substantial rights, particularly to a fair trial, since the trial was tainted initially through the Court's permitting the Kahns to testify, or to take the stand and invoke their constitutional privilege under the Fifth Amendment.

The Court, in its unsolicited and incorrect admonishing instruction (Tr. 31, *supra*), added to the harm already initially done by reiterating and by refreshing the jury's recollection of the Kahns' invocation of the "Fifth" just moments before the jury retired for its short deliberation. Any further amplification of this dilemma and predicament by counsel would not have been curative but rather would have re-emphasized the role of the Kahns as Government-forced witnesses injuring the petitioner's position all the more.

III. The General Conduct of the Trial Relative to the Government's Interrogation of the Kahns on Direct Examination over the General Objection to their Testifying ab Initio in Addition to Many Specific Objections, which were Sustained, Irreparably Damaged the Petitioner.

After the general objection to the use of the Kahns as witnesses, the Court permitted the Government to call Annette Kahn to the stand and, after a few preliminary questions, the prosecution asked:

> "Q. During 1960, Mrs. Kahn, did you and your husband have some type of business relationship with the defendant David Namet?" (Tr. 7)—

to which the witness invoked the privilege, a bench conference ensued (Tr. 7, 8, 9, 10, 11, 12), and the objection was sustained.

Again later the prosecution persisted in pressing its theory, to wit:

> "Q. After March 19, 1960. You [i.e., Annette Kahn] didn't know prior to that what it was, and you didn't know that a person who was engaged in accepting wagers had to register, and you didn't know that a person—" (Tr. 13)—

to which objection was pressed, and another bench conference ensued (Tr. 13, 14, 15), the result of which appeared to be that the Government and the Court had finally agreed that the Kahns could not be forced to testify or be placed on the stand.

Finally, when the prosecution was permitted to call Irving Kahn to the stand as its last witness on direct examination—again over the general objection of the petitioner—the following series of questions were put to him:

"Q. Do you know the defendant David Namet?

"A. Yes, sir.

"Q. Did you have some dealings with the defendant David Namet in February and March of 1960?

"A. I refuse to answer by advice of counsel.

"The Court: All right, I will order you to answer that question. The question is yes or no, did you have some dealings with him?

"The Witness: Yes.

"Q. Can you tell what those dealings were?

"A. I refuse to answer on advice of counsel.

"The Court: Go ahead. Next question.

"Q. Did you accept wagers at your variety store in Chelsea in February and March of 1960?

"A. I refuse to answer on the advice of counsel.

"The Court: I will allow that question." (Tr. 23.)

"Q. And were you paid a commission on all bets you took in your variety store?

"A. I refuse to answer.

"The Court: I will sustain that objection. Next question.

"Q. How often did the defendant David Namet come to your store, Mr. Kahn?

"A. I refuse to answer.

"The Court: No, you may answer that.

. . . . . .

"Q. How often did he come to your store?

. . . . . .

"A. A couple of times a week.

"Q. Isn't it a fact that he came once in the morning and once in the afternoon?

"A. No, sir.

"Q. Every day of the week?

"A. No, sir.

"Q. Well, let's exclude Sundays. Monday through Saturday didn't he come to your store twice every day, once in the morning and once in the afternoon?

"A. No, sir.

"Q. Who did you accept the bets for that you took in your variety store?

"A. I refuse to answer.

"The Court: I will sustain that. Next question.

"Q. Did you ever take bets for the defendant David Namet?

"The Court: I will sustain an objection to that." (Tr. 25.)

The petitioner submits again that this questioning could have been avoided had the Court properly sustained petitioner's objection to the forcing of the Kahns to the stand initially. To repeat what was said before, reversible error is caused by an extended examination of a co-defendant whose refusals to incriminate himself plant in the jury's mind the prosecution's theory of the crime not yet substantiated by evidence, 45 West Virginia Law Review 596, *supra*. Calling and questioning, over defendant's objection, witnesses jointly indicted with the defendant, with knowledge of their forthcoming refusal, is reversible error. *Johnson* v. *State*, 158 Texas Criminal 6, 252 S.W. 2d 462 (1952).

Consequently, the petitioner contends that the prosecution, through the Court's error in allowing the Kahns to take the stand, inferentially elicited some evidence through the prosecutor's "testifying-type" of questions, objections to which were sustained upon the witnesses' invocation of the Fifth Amendment. Such inferences contaminated the conduct of the trial and poisoned the jury's mind beyond

any salvation through a Court's instruction or otherwise. Such deliberate damage, as evidenced by bench colloquies and the questions themselves, affected the substantial rights of the petitioner, who should not be penalized by over-zealous prosecution.

Conclusion.

Without indulging in repetition of the foregoing arguments, the petitioner contends that the trial was permeated with the spectre of evidentiary inferences permitted when the Court failed to heed the general objection of the petitioner in advance and *ab initio* to the use of the Kahns as witnesses for the Government because the Kahns intended to avail themselves of their privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States, so much so that real and substantial damage was done to the rights of the petitioner which no final instruction or admonition to the jury could cure.

Once the Kahns were forced to the stand, the damage was done. Anything thereafter in the trial prejudicial to the petitioner flowed as an unavoidable consequence of the initial error and compounded it. Once before the jury and invoking their privilege there arose a strong probability that the Kahns' refusal would be taken as evidentiary without the sanction of an oath or the benefit of cross-examination. Likewise, the professed guilt of the Kahns to a similar charge, which was virtually retried during their forced interrogation, and their sparse association with the petitioner, indelibly added to any fixation of the petitioner's guilt in the jury's mind, which was in turn compounded by the method of questioning. Nor could any instruction by the Court have erased such fixed inferences from the jury's mind.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 134

DAVID NAMET, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 41) is reported at 301 F. 2d 314.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1962 (R. 42). The petition for a writ of certiorari was filed on May 21, 1962, and was granted on October 15, 1962 (R. 42). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a witness who had pleaded guilty to a similar charge was properly called to testify by the

government after the prosecutor had been told that petitioner's counsel had advised the witness to claim the privilege against self-incrimination.

2. Whether the cautionary instruction to the jury regarding the significance of a witness' claim of privilege, which we concede to have been defective, was so seriously prejudicial as to require a new trial, notwithstanding petitioner's failure to object or to raise the issue in the appellate courts.

RULES INVOLVED

Federal Rules of Criminal Procedure:

Rule 30 provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52 provides:

> (a) Harmless Error.
>
> Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error.
>
> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the District of Massachusetts on two counts charging violations of the wagering tax laws.[1] He was sentenced generally to imprisonment for four months and to pay a fine of $1,000 (R. 39). The judgment was affirmed by the court of appeals *per curiam* (R. 41).

1. THE WAGERING OFFENSE

The evidence to support the crime charged is not directly challenged in this Court. It may be briefly summarized as follows:

The petitioner, who was under surveillance, followed the same route each afternoon, stopping for less than one minute at various bookmaking establishments (variety and cigar stores). It was observed that he progressively filled his pockets, until he reached his residence, with the material accumulated during the afternoon (R. 16–17). Each morning,

[1] Count I charged a violation of 26 U.S.C. 4411 in failing to pay the special occupational tax required to receive wagers and Count II charged a violation of 26 U.S.C. 4412 in failing to register to engage in the business of receiving wagers (R. 4).

petitioner again visited these establishments stopping for 3 to 5 minutes at each place. These facts indicated that petitioner was merely collecting the material in the afternoon but was "settling up" in the morning (R. 18).[2] On one occasion, when an agent was standing in a smokeshop, petitioner told the counterman that he would wait until the agent left (R. 18).

On March 19, 1960, petitioner was arrested and his residence searched under authority of arrest and search warrants (R. 35–36). More than $1,000 in bills and coins were found in the house and on his person, together with "number pool" wagering slips, "horse bet" slips, and prepared "pool" cards of the type used in a wagering operation (R. 37). The numbers pads or bookie slips found in petitioner's residence were the originals which would normally be held by the "bookie," rather than the carbon copy given to the players (R. 20–21).

Petitioner admitted to an agent at the time of his arrest that he was aware of the federal requirements of registration before accepting wagers, but claimed that he was not a bookie (R. 36–37). Petitioner's son, a lawyer, took the stand at the trial and claimed that the betting slips had been in the house for a "number of years," and that the bundles and envelopes of money found in the house came from the proceeds of an insurance policy on the life of his mother who had died in 1958 (R. 26–28, 37). He did not explain the

[2] A "pick-up" man or "runner" who has no proprietary interest does not "settle up" (R. 35).

wagering materials found on the petitioner at the time of the arrest. He stated that his father was not a bookie (R. 28).

2. GOVERNMENT WITNESSES WHO CLAIMED THE PRIVILEGE AGAINST SELF-INCRIMINATION

a. Mr. and Mrs. Kahn, who were the proprietors of one of the stores frequented by petitioner, pleaded guilty to wagering tax violations on the morning that petitioner's trial opened (see R. 1–3). They were represented by the same attorney who represented petitioner (R. 1–3).

In outlining the proposed evidence in the opening statement to the jury, the government stated that it had reason to believe that there would be testimony by a husband and wife to the effect that they had accepted wagers for petitioner and that petitioner would settle with them daily for the bets of the previous day (R. 5).

At the conclusion of this opening statement, petitioner's counsel, at a bench conference, noted that the government was going to attempt to use the Kahns as witnesses and stated that, although they had pleaded guilty, "I didn't waive any Constitutional privileges in their behalf" (R. 6). The court indicated that their privileges ceased after they pleaded, but stated that he would rule on any claims if they took the stand and "if they claim the Fifth" (R. 6).

b. Mrs. Annette Kahn was called as a witness by the government. Preliminarily she testified that she and her husband owned a variety store and that she had known petitioner for two years (R. 7). There-

after, when she was asked whether they had some type of business relationship with petitioner, she replied (R. 7):

> Our attorney advised us not to answer on the plea of the Fifth Amendment.

Petitioner's counsel stated, "The defendant refuses to answer on my advice," and the trial judge called a conference at the bench. The trial court stated that, because she had pleaded guilty to this offense, she could be compelled to testify as to it, but not as to other crimes (R. 7). Petitioner's counsel asked permission to stand beside the government witness as her counsel while she testified, but the trial judge did not approve of this procedure (R. 8). Thereafter, petitioner's counsel stated that he would rise from his chair as an indication that the witness was claiming the privilege against self-incrimination under the Fifth Amendment. Counsel also informed the judge that when he had the witness plead guilty, he did not have in mind that she would cooperate with the government (R. 8).[3] Thereafter the court ruled that the witness had a right to claim the privilege under the Fifth Amendment to anything which would lend itself to a charge of conspiracy (R. 9).

During the conference at the bench the government explained that the Kahns had made statements to the

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[3] The Kahns were sentenced on the same day as the petitioner. Irving Kahn was given a suspended sentence of one year; placed on probation and fined $1,500. The imposition of sentence on Annette Kahn was suspended and she was placed on probation (R. 3).

agents, admitting that they had accepted bets; that petitioner would pick up the wagers, leaving 25 percent for the Kahns; and that if the payoff exceeded this amount, petitioner would give them the difference in cash. The government also stated that this testimony would be consistent with the particular slips found in the petitioner's possession relating to this variety store and that this evidence would show petitioner was a principal (R. 10–11). The court ruled that the government could not use the witness to bring out that petitioner had "settled-up" with the Kahns (R. 10–11, see also R. 22–23). The court declined to allow the government to show that the witness did not have the requisite knowledge to be involved in a conspiracy. The government then abandoned its examination of the witness (R. 12–14).[4]

c. Irving Kahn, also called as a witness by the government, testified that he ran a variety store and knew petitioner. When asked whether he had dealings with petitioner in February and March 1960, he declined to answer on the advice of counsel, but the court ruled that the question should be answered. Kahn then admitted that he had dealings with petitioner (R. 23). The court sustained the claim of privilege as to a question asking Kahn to tell what the dealings were, but ordered Kahn to answer whether he accepted wagers at the store in February or March of 1960 (R. 23). Kahn said he did not

[4] In fact, the government's attorney was about to abandon the examination of both Kahns until the trial judge suggested otherwise (R. 14–15).

accept "wagers" and then declined to answer whether he accepted any "bets" in the variety store (R. 24).

At that point, petitioner's counsel stated that Kahn had already pleaded guilty to that and claimed (R. 24), "I guess he is misinterpreting my standing up, your Honor." When the court asked for an explanation, a bench conference followed in which petitioner's counsel explained that rather than objecting all the time, counsel would rise in order to signal to the witness, but that now the witness was confused. The court suggested that counsel remain seated. Counsel complained, "Now I won't know whether to stand up or not," to which the trial judge responded, "Well, don't give him any signals. I will take care of it" (R. 24).

Thereafter the witness stated that he had taken bets in the store and that petitioner had come to the store a couple of times a week. The court allowed the witness to claim the privilege as to questions asking the name of the person on whose behalf he had accepted bets and whether he took bets for petitioner. The government then excused the witness (R. 25).

3. INSTRUCTIONS TO THE JURY REGARDING THE KAHNS' CLAIMS OF PRIVILEGE

In the course of the instructions to the jury, the following charge was given (R. 31):

> Now in the first place, you must not draw any inference from the fact that the defendant himself did not take the stand. He doesn't have to. He can sit mute and stand or fall upon the Government's case. Or he may take the stand as he wishes. But from the fact that

> he didn't take it, you should not draw any inference against him.
>
> Nor should any inference be drawn against him because the Kahns refused to testify, unless it would be a logical inference that would appeal to you as having a direct bearing upon the defendant's guilt.
>
> Now, the layman seems to think that circumstantial evidence is a second-class kind of evidence. It is not. Circumstantial evidence is just as good as direct evidence if it has that impact upon your mind that would exclude every other reasonable hypothesis except the one of guilt.

b. At the close of the instructions (R. 32) the court asked if there were any further requests, or suggestions of errors or omissions. Petitioner's counsel requested only that the court reiterate that if the jurors found the defendant was a bookie, he was guilty but if he was a pick-up man, he must be found not guilty. The court suggested that the point had been covered, to which counsel agreed, but said he thought the charge should end that way. The court allowed the jury to retire without further comment.

SUMMARY OF ARGUMENT

I.

Few witnesses are eager to testify, yet all have a duty to testify in aid of law enforcement. Hence, the general rule is that, absent special circumstances, both the government and the defendant have a right to call witnesses who are able to present relevant evidence.

A. Since the claim of privilege is personal to the witness and must be asserted in relation to specific questions, it is almost invariably necessary to test the propriety and validity of the claim in a judicial proceeding; the pre-trial statement by an attorney or the witness that privilege will be claimed is not ordinarily sufficient. We recognize that unusual cases may arise where the apparent prejudice resulting from the assertion of the claim would outweigh the relevance of the proposed testimony, but this is controlled by the same principles which govern the admissibility of all evidence. In this case, the circumstances fully justified the calling of the Kahns to the stand.

B. The Kahns were able to give direct evidence to support the charge against the petitioner. No one would deny that their testimony would strengthen a case based upon circumstantial evidence, however strong. The government knew of this evidence because the Kahns had given statements to government agents. Furthermore, the Kahns had pleaded guilty to similar charges and thus it was reasonable for the government to believe that they would not claim the privilege or that a claim, if made, would not be upheld. See *Reina* v. *United States*, 364 U.S. 507, 513. In fact all the cases in the courts of appeal which express concern with the problem have drawn the line to exclude cases where the witness has entered a plea. *United States* v. *Maloney*, 262 F. 2d 535, 537 (C.A. 2).

In this case there is an added reason why it was proper for the government to put the witnesses on the stand. Since the petitioner's attorney also

represented the witnesses, there was a likelihood that the claim of privilege would be asserted on impermissible grounds, *i.e.*, to protect the petitioner, rather than the witnesses. In these circumstances, the statement by the attorney for the principal that the witnesses would claim the privilege was properly not allowed to preclude the government from attempting to elicit relevant evidence. Petitioner's counsel, we point out additionally, *made no request* that the witnesses be examined preliminarily outside the presence of the jury.

There is no basis for the complaint that the questioning was unfair. The claim of privilege was asserted in relation to very few questions and was upheld as to still fewer. The Kahns, voluntarily and pursuant to orders of the court, gave important relevant testimony. There clearly was no attempt to badger the witnesses.

II

In its response to the petition for a writ of certiorari, the government called attention to an issue not raised at any stage by petitioner—the correctness of of following cautionary instruction given as part of the charge to the jury:

> Nor should any inference be drawn against [petitioner] because the Kahns refused to testify, unless it would be a logical inference that would appeal to you as having a direct bearing upon the defendant's guilt.

Viewed in the context of the trial—the strong evidence of petitioner's guilt, the closing arguments of counsel

which made no mention of nor comment upon the testimony of the Kahns, and the court's full charge—that ambiguous instruction, though defective, does not call for reversal. The failure of petitioner's counsel to take exception to the instruction or to raise the question in a motion for a new trial, on appeal or in his petition for certiorari confirms the inference that the comment had no impact upon those in the courtroom, or upon the outcome of the case.

The sound judicial policy embodied in Rule 30 of the Federal Rules of Criminal Procedure is pertinent here. Except in extraordinary circumstances, objections must be made at trial in time to allow the court to correct alleged errors and thereby to avoid burdensome and unnecessary retrials. We do not suggest that a failure to make a timely objection should preclude notice of a grave or fundamental error, but only that the extraordinary circumstances which warrant such a rejection of Rule 30 are not present here. The instruction, when viewed in its trial setting, is not of the order of gravity to require reversal of the conviction in the interests of justice.

ARGUMENT

I

THE GOVERNMENT PROPERLY CALLED TO THE STAND COMPETENT WITNESSES WHOM IT REASONABLY BELIEVED TO BE ABLE TO GIVE RELEVANT EVIDENCE

A. THE PROSECUTION IS NOT BARRED FROM CALLING A WITNESS MERELY BECAUSE HE MIGHT CLAIM PRIVILEGE AS TO CERTAIN RELEVANT QUESTIONS

Few witnesses, unless they have a personal interest in the litigation, are eager to testify, particularly in a

criminal case. To overcome traditional testimonial reluctance, both sides must have access to the power of subpoena, a right guaranteed to the defendant by the Sixth Amendment to the Constitution. Every citizen has a duty to testify to the facts which will aid in a judicial determination, subject of course to the protections afforded by law. Hence, the general rule must be that, in the absence of unusual circumstances, either party may, as a matter of right, call to the stand witnesses whom it reasonably believes will be able to offer relevant evidence.

The possibility that the witness may claim the privilege against self-incrimination does not, in itself, constitute a special circumstance which should take a case out of this general rule. Whether the prosecution should refrain from calling a witness in the usual course turns on the particular facts of a given case—the relevance of the testimony; the certainty or lack of certainty on the part of the government that the privilege will be claimed; whether or not there are reasonable grounds for believing that the claim would be sustained in relation to the questions contemplated. In this case, we believe that the government had good and proper reasons to call the Kahns to the stand: it was known that they could give highly relevant testimony and it was reasonable for the prosecutor to assume that the privilege might not be claimed, or, if claimed, that it would not be upheld as to evidence important to the case. The government, therefore, was not bound to change its normal course of action because of statements by the attorney for petitioner

as to what the Kahns would do, particularly since the same attorney represented both petitioner and the Kahns, although their interests were divergent on this score.

The statement by an attorney that a witness is going to claim the privilege against self-incrimination cannot, standing alone, compel the prosecution to refrain from calling him. The privilege is personal to the witness. *United States* v. *Monia,* 317 U.S. 424, 427. It cannot be used to shield others or merely to avoid disgrace. *Brown* v. *Walker,* 161 U.S. 591, 596–605; *Hale* v. *Henkel,* 201 U.S. 43, 69–70; *Rogers* v. *United States,* 340 U.S. 367; *United States* v. *Rosen,* 174 F. 2d 187, 188 (C.A. 2), certiorari denied, 338 U.S. 851.

The witness himself may not escape the duty to testify merely by stating that he is going to claim the privilege. He is bound to appear when subpoenaed and be sworn. *Blair* v. *United States,* 250 U.S. 273, 281–282. He cannot claim the privilege in advance or as to all or any questions. See *United States* v. *Sullivan,* 274 U.S. 259, 264; *Marcello* v. *United States,* 196 F. 2d 437, 441 (C.A. 5). Conversely, a party is not obliged to refrain from asking questions merely because the answers may be incriminating. *United States* v. *Alaimo,* 191 F. Supp. 625, 630 (M.D. Penn.) affirmed, 297 F. 2d 604 (C.A. 3), certiorari denied, 369 U.S. 817. It remains with the witness to claim the privilege in relation to a specific question. Accordingly, even where there is a likelihood that a witness may claim the privilege, it is generally necessary

to test the matter in the crucible of an open judicial proceeding. See *Hoffman* v. *United States*, 341 U.S. 479, 486. Otherwise, the party seeking to adduce the testimony would not know (1) whether the witness, under the solemnity of an oath administered in court, would actually claim the privilege, (2) whether he would be sustained in his claim, or (3) whether the claim relates to all or only part of the relevant inquiry.

The truly exceptional case, we suggest, is typified by *United States* v. *Tucker*, 267 F. 2d 212 (C.A. 3), where the proceedings at a second trial were under review. During the first trial, a witness had asserted his privilege when asked about relevant transactions. At the second trial, the witness was again called and subjected to a "similar inquiry." He again pleaded the privilege. The court held the questioning improper where "[t]here is no suggestion that the government had any reason to believe that at the second trial the witness would answer those questions he refused to answer at the first trial" (*id.* at 215). It said, "* * * a second interrogation, which had no apparent purpose but to invite invocation of the privilege against self incrimination, is improper and is likely to constitute reversible error" (*ibid.*).

In other words, where there are overwhelming probabilities that the witness will claim the privilege and will be sustained in his claim *as to his entire testimony*, he ought not be called at all, or at least not

called before the jury until the matter has been explored by the trial court.[5] Beyond this, one cannot, as Judge Learned Hand stated in *United States* v. *Maloney*, 262 F. 2d 535, 537 (C.A. 2), "lay down any general rule that will cover all instances." Each case must be appraised in the light of the total circumstances—the relevancy of the testimony; the degree of probability that the privilege will be claimed; the potential validity of any claim of privilege; the danger of prejudice; and the likelihood that any valid claim of privilege will go to something appreciably less than the whole of the testimony that the witness is capable of providing.

B. IN THE CIRCUMSTANCES OF THIS CASE THE CALLING OF THE WITNESSES WAS JUSTIFIED

1. *The testimony of the Kahns was directly relevant to the issues on trial.*

There is no question that the government had good reason to believe that the Kahns could give relevant testimony with respect to the charges against petitioner. Surveillance had shown that petitioner followed a route each morning and afternoon which took him into known bookmaking establishments; that he spent a longer period of time in each establishment in the morning than in the afternoon, a routine which would be consistent with the practice of "settling up" in the morning; that in the afternoon petitioner took the material collected to his home and

[5] It is a familiar principle that even relevant testimony may be excluded if its prejudicial effect is so great as to outweigh its relevance. *Gruenwald* v. *United States*, 353 U.S. 391, 424.

that no one came there to pick it up. There were still other circumstances which tended to show that petitioner was engaged in the wagering business as a principal without having paid the special tax—petitioner's refusal to deal in front of strangers; the seizure of bookmaking paraphernalia at the time of his arrest; petitioner's admission that he was aware of federal statutory requirements. However, no lawyer could doubt that the government's case would be strengthened by "direct" evidence that petitioner was in fact acting as a principal with regard to the acceptance of wagers. In their statements to the government the Kahns had indicated they could supply this direct evidence.

2. *In view of the fact that the Kahns had previously given statements and had pleaded guilty, the government could reasonably expect that they would not claim, or would not be permitted to claim, a privilege against testifying as to their dealings with petitioner.*

There was nothing unusual about the position of the witnesses that would in itself suggest that they would claim the privilege if placed upon the stand. Co-defendants and accomplices are competent witnesses and have been used for many years.[6] Since the Kahns had already given statements to agents of the government as to their dealings with petitioner,

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[6] *Benson* v. *United States*, 146 U.S. 325, 333–337; *Rosen* v. *United States*, 245 U.S. 468, 469–472; see *Funk* v. *United States*, 290 U.S. 371, 379–380; *United States* v. *Ford*, 99 U.S. 594.

the prosecutor had a right to expect that they would give the same account before the jury.

Indeed, since the Kahns had already pleaded guilty to engaging in the wagering business without registering and paying the federal tax, the prosecutor originally had no reason to believe that they would claim the privilege or that any such claim would be upheld. See *Reina* v. *United States*, 364 U.S. 507, 513. Once the reason for the rule against compelling incriminating testimony has been eliminated either by plea (*United States* v. *Cioffi*, 242 F. 2d 473 (C.A. 2), certiorari denied, 353 U.S. 975), conviction (*United States* v. *Romero*, 249 F. 2d 371, 375 (C.A. 2)), statute of limitations (*United States* v. *Costello*, 222 F. 2d 656 (C.A. 2), certiorari denied, 350 U.S. 847), or otherwise, the privilege ceases. *Brown* v. *Walker*, 161 U.S. 591, 595–600; *Hale* v. *Henkel*, 201 U.S. 43, 67; *Ullmann* v. *United States*, 350 U.S. 422, 437.

There was, moreover, no apparent likelihood that the Kahns would incriminate themselves further by the testimony sought from the stand. Their extrajudicial admissions apart, they had pleaded to the essential elements of the substantive offense. Thus, it was not likely that any testimony would be elicited at the trial which would afford a basis not already known to the government for any further accusations.

The judge, to be sure, ultimately ruled that the Kahns could properly invoke the privilege because

testimony as to their relationship with petitioner could be used in support of a conspiracy charge. But the prosecutor, long since aware of the relationship of the Kahns to petitioner because of the statements they had given, had not included a conspiracy count in the indictment, and certainly had no reason to think that they would apprehend a further charge. The government has a publicly declared policy against the institution of successive prosecutions growing out of the same facts. See *Petite* v. *United States*, 361 U.S. 529. And there is a certain irony, as noted by the trial judge (R. 9, Tr. 20) that, because a temperate prosecutor did not multiply the offenses by adding a conspiracy count, witnesses who had voluntarily pleaded guilty were able to refuse to give testimony as to the very matters comprehended by their plea. Whether the judge's ultimate ruling on the claim of privilege was correct or not is immaterial to the issue before this Court. What is material is that, in view of the realities of the situation known to the prosecutor, he had reason not to anticipate a claim of privilege and to believe that, if it were asserted, it would not be sustained. We note in this connection that those cases in the courts of appeal which have expressed concern with the problem posed by calling a witness who is likely to claim the privilege against self-incrimination have drawn the line to exclude cases where the witness has entered a plea of guilty. *United States* v. *Mahoney*, 262 F. 2d 535, 537 (C.A. 2); *United States* v. *Cioffi*, 242 F. 2d 473 (C.A. 2),

certiorari denied, 353 U.S. 975; *United States* v. *Romero*, 249 F. 2d 371 (C.A. 2); *United States* v. *Gernie*, 252 F. 2d 664 (C.A. 2), certiorari denied, 356 U.S. 968. See *United States* v. *5 Cases*, 179 F. 2d 519 (C.A. 2) and 86 A.L. R. 2d 1443.

3. *The government was not under a duty to accept as conclusive the statement of petitioner's attorney that the Kahns would claim the privilege.*

As against the forgoing considerations, the government had only the statement of the attorney who represented both petitioner and the Kahns that the witnesses would claim the privilege. Aside from the precept, noted above, that the privilege must be personally claimed by the witness, the circumstances of this case rendered it particularly appropriate to have it determined in open court, under the solemnity of an oath, whether the privilege would be claimed and whether it would be sustained as to all testimony of the Kahns. The interests of the Kahns, who had pleaded guilty, were so different from those of petitioner, who was standing trial, that the government had the right to have the witnesses themselves, under oath, assert the claim of privilege. Furthermore, in view of the plea of guilty there was, as discussed above, a substantial possibility that the claim of privilege would not be sustained, or at least not sustained as to all questions.[7]

[7] The fact that Mrs. Kahn had claimed the privilege as to one question asked during her appearance did not render it im-

The situation, as it appeared, was one in which the lesser offenders had been encouraged to plead guilty on the theory that a light sentence would be imposed, while the principal, who had much more to lose, was standing trial in the hope that he could be acquitted for lack of direct evidence against him. In these circumstances, the attorney for the principal was properly denied the opportunity, on his mere say-so, to control evidence directly relevant to the government's case. Moreover, although petitioner taxes the government for not acting on his suggestion that the witnesses would claim the privilege, at no time did he request—either in his capacity as petitioner's counsel or as counsel for the witnesses—that the trial court conduct a preliminary proceeding out of the presence of the jury.

Nor is there any basis for the complaint that the questioning of the witnesses was unfair to petitioner. Mrs. Kahn was asked only one question as to which she claimed privilege (R. 7). The judge then ruled

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proper for the government to call Mr. Kahn to the stand. The privilege is personal, *United States* v. *Monia*, 317 U.S. 424, 427, and the government was entitled to determine individually as to each witness whether the privilege would be claimed. Petitioner's attorney made no request for preliminary proceedings out of the presence of the jury to determine whether Mr. Kahn would claim the privilege and, if so, whether it would be sustained as to the questions the government intended to ask. Further, it is clear from the proceedings that the interrogation of Mr. Kahn had a proper purpose—he answered a number of questions voluntarily and gave important relevant testimony (see *infra*, pp. 22–23). He was not called "to invite invocation of the privilege against self incrimination * * *". *United States* v. *Tucker*, 267 F. 2d 212, 215 (C.A. 3).

that she could be asked anything that was covered by the plea of guilty, but not questioned as to matters that might implicate her in other crimes (R. 7). Thereafter, she responded to several questions and, after an objection which went not to the privilege but to materiality, she was excused (R. 12–13).

The calling of Mr. Kahn was delayed not, as petitioner suggests, for reasons of strategy, but because the government wished to submit a memorandum on the subject (R. 21–22). When summoned, Kahn was asked 18 questions of which he answered 10 without objection. He claimed the privilege as to eight but was sustained in his claim only as to four. He then answered the other four (R. 23–25).

There is no doubt that each of the Kahns was in a position to give, and did give, relevant evidence as to which they could not properly claim the privilege. The government asked (and petitioner conceded that the question was proper in light of the guilty pleas) (R. 23–24) whether the Kahns had accepted wagers at their variety store in Chelsea in February and March 1960—the time and place (Chelsea) alleged in the information against petitioner (R. 4). The government also asked and both Kahns testified affirmatively (R. 7, 23) whether they knew petitioner. Mr. Kahn was asked and required to answer whether he had had dealings with petitioner during the period in question and how often petitioner had come into his store (R. 24–25). This testimony, when matched with other evidence that petitioner had been observed to make twice-daily calls upon variety stores, such as the

Kahns', in a manner indicative of bookmaking operations, was important circumstantial evidence from which the jury was entitled to infer the petitioner's guilt. The fact that Mr. Kahn gave such testimony both voluntarily and upon orders of the court fully justified the government's action in putting him on the stand.

This case is utterly unlike *Washburn* v. *State*, 164 Tex. Cr. R. 448, 299 S.W. 2d 706 (Br. 10), on which petitioner relies. There the prosecuting attorney called a co-defendant to the stand, who answered one question. Then in 21 pages of testimony the witness refused to answer every additional question, while the State's attorney "by fact-ladened" questions placed the case before the jury. No such spectacle is present in the case at bar. The court drew a line carefully between what it would and would not permit, and the prosecutor respectfully abided by its rulings.

II

THE CAUTIONARY INSTRUCTION TO THE JURY AS TO THE SIGNIFICANCE OF THE KAHNS' REFUSAL TO TESTIFY, THOUGH DEFECTIVE, DOES NOT CALL FOR REVERSAL

In its memorandum response t the petition for a writ of certiorari, the government called attention to an issue not raised at any stage by petitioner, *i.e.*, the correctness of the cautionary instruction given to the jury in relation to the Kahns' refusal to testify fully. The instruction was as follows (R. 31):

> Nor should any inference be drawn against [petitioner] because the Kahns refused to tes-

> tify, unless it would be a logical inference that would appeal to you as having a direct bearing upon the defendant's guilt.

Our memorandum stated (pp. 12–13):

> * * * we would not object to this Court's granting certiorari, if petitioner so requests, for the purpose of remanding the case to the court of appeals in order that that court may indicate whether it has ruled on the question and, if not, may determine whether the apparent error in the charge requires reversal of the conviction despite the failure to raise the point and the strong evidence of guilt. * * *

Petitioner made no response to the government's suggestion but now argues (Br. 13–15) that the instruction was plain error.

However, when viewed in the context of the trial—particularly the strong evidence of guilt, the closing arguments of counsel and the court's entire charge—there are sound reasons for concluding that this instruction, to which no exception was taken, does not require reversal. The judge explained what the charge included and what it did not include (mere gambling or bookmaking). He outlined the general legal propositions applicable to all criminal cases—burden of proof, reasonable doubt, inferences from evidence—and then went on to explain the contested issues in terms of the circumstantial evidence related to the facts of this case. The instruction at issue was part of the general instructions on the inferences from evidence and followed an instruction that the jury must not draw any inferences from the fact that the

petitioner had not taken the stand since he was entitled to remain mute. When the judge came down to the specific facts of the case, summarizing the evidence, no mention was made of any testimony given by the Kahns (R. 31–32). Nor had there been any comment on the testimony of the Kahns in the closing argument of government counsel.

The failure of petitioner's counsel to object and his failure thereafter to allude to the point on appeal confirm the inference that the comment did not have an impact upon those who were present in the courtroom or affect the outcome of the case. The instruction did not deal with a vital issue or phase of the case, as in *Bollenbach* v. *United States*, 326 U.S. 607, 612. It did not relate to an essential ingredient of the offense as in *Screws* v. *United States*, 325 U.S. 91 and *Wiborg* v. *United States*, 163 U.S. 632. It did not involve any constitutional rights of the defendant, as distinct from the witnesses. Cf. *Bruno* v. *United States*, 308 U.S. 287.

There are, of course, important considerations of judicial policy which support the settled principle, reflected in Rule 30, F.R. Crim. P. (*supra*, p. 2), that one must make timely objection or lose the right to assign error.* An objection made at the appropriate

*There is no merit to petitioner's contention that he had no obligation to object at the trial because any further action would have "re-emphasized the role of the Kahns as Government-forced witnesses * * *" (Br. 15). Petitioner was properly afforded an opportunity to make objections out of the hearing of the jury and, even if he believed the damage irreparable, it was still his obligation to call the court's at-

time affords the trial judge an opportunity to correct the error or omission and to avoid the loss and burdens occasioned by a retrial. Cf. *United States* v. *Bryan*, 339 U.S. 323, 333. If counsel are not held to this requirement, the less scrupulous will be encouraged to take out insurance against an unfavorable jury verdict by saving points for the appellate courts. See *Johnson* v. *United States*, 318 U.S. 189.[9]

This is not to urge that grave or fundamental or pervasive errors should go unnoticed in the name of strict observance of rules. It is to say only that the error involved in this case is not, in our view, of such gravity or importance as to require, in the interests of justice, a reversal of the conviction.

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tention to the instruction. Beyond this, his contention does not explain why, if he believed the instruction prejudicial, he did not raise the matter in a motion for a new trial, on appeal or in his petition for certiorari.

[9] In *Johnson* the Court held that, although the error was serious, a knowing failure to object precluded a new trial. Although disapproving of the prosecutor's comment on the defendant's claim of privilege as to certain questions (which the court had sustained), this Court declined to order a new trial because counsel was found intentionally to have failed to save the point, in part, by standing by and voicing no protest during the instructions to the jury. The Court stated (318 U.S. at 201), "The fact that the objection did not appear in the motion for a new trial or in the assignments of error makes clear that the point now is a 'mere afterthought.'"

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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